

J-21.800 included in the descriptions in the permit, applicant has no present right to utilize same. However, the permit may properly be changed to include same in this proceeding.

E-24.4831  
J-21.800 It is not appropriate in change proceeding to attempt to retroactively define the term "mining" in the original permit. However, examiner may have to decide what was probably meant by the term "mining" if such determination is necessary to resolution of the change proceeding. Held, determination not necessary under facts of this case.

[Change authorized.]

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<b>Final Order Date:</b>	08/11/87 (G W/C)	<b>Applicant:</b>	Houston
<b>Case #/Type:</b>	60117-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/30/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	06/27/86	<b>Use:</b>	Irrigation

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A-4.930  
B-21.780  
E-24.4831 Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. If objector thus meets his burden of production, then applicant must prove by substantial credible evidence that the anticipated adverse effect will not occur. If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

A-4.9395  
B-21.780 Where objector alleged his well will be interfered with by the one to two-foot drawdown which applicant has shown may occur, but does not state why he could not reasonably exercise his water right under the changed conditions, he has not met his burden of production.

B-5.6979  
T-5.800 To ensure that the amount of water requested is put to beneficial use, permit conditioned so that total volume applied to place of use under permit is reduced by volume applied pursuant to other rights already appurtenant to that place of use.

U-14.120 If percolating groundwater is physically available at the well head, it is unappropriated within the meaning of the statute if there is no adverse effect to other wells in the aquifer. [Caution: Statement in proposal for decision at p. 24 that diversion of appropriated water always adversely affects prior appropriators is true only where their seniority cannot be readily exercised, as in the case of percolating groundwater.]

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<b>Final Order Date:</b>	09/25/87 (D)	<b>Applicant:</b>	Zemliska
<b>Case #/Type:</b>	57870-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/29/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	04/13/87	<b>Use:</b>	Fish Ponds

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A-4.930  
P-18.720 The corpus of water diverted for beneficial use is the personal property of its appropriator (until after he has used and relinquished it). Use thereof by another, without the owner's permission, constitutes trespass (i.e., interferes with his right to the exclusive use and enjoyment of the water). [Note: Although the proposal states that trespass is adverse effect to a water right as a matter of law, whether the trespass equals adverse effect is probably a question of fact. Does the trespass actually interfere

with the beneficial use of the water by the legitimate appropriator?]

S-15.920 If all water in a private ditch was legally diverted for beneficial  
U-14.1259 use, there is no unappropriated water in that ditch.

U-14.1259 Water which has been legally diverted by an appropriator is perforce appropriated, **i.e.**, is not unappropriated water.

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<b>Final Order Date:</b>	09/28/87 MODIFIED	<b>Applicant:</b>	Harpole Family Corp.
<b>Case #/Type:</b>	32798-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/27/81	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/25/86	<b>Use:</b>	Fire Protection

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E-13.310 Whether water may be impounded for temporary emergency use pursuant to § 85-1-113(3), MCA, is unclear. However, if the statute is ultimately interpreted to authorize such anticipatory diversion, the board should adopt rules limiting the size of such impoundment.

L-1.940 In case of permit which has not been perfected by putting water to beneficial fire protection use, permittee would normally be considered to have only an inchoate water right. Query: May he call the source to obtain that first beneficial use? Entitlement to such call is only possible if the "Colorado theory" requiring actual beneficial to establish a water right is not applied by the Montana courts in such a case, and the "theory of possessory right" recognized in **Bailey v. Tintinger** for water supply companies is.

P-5.8021 Permittee did not prosecute necessary appropriation works for fire protection, but did create a pond for stock. As stock water was included in the permit, permit modified to delete fire protection, and to reduce size of storage facility to stock pond size.

P-5.8021 Because an estimate of time within which it is reasonable to expect  
T-5.800 that water diverted and stored for fire protection will have been used to put out an unplanned fire cannot be factually based, and because imposition of any time limit for putting the stored water to the contemplated beneficial use is thus necessarily arbitrary, the Department's imposition of a time limit upon permittee was void **ab initio**, and revocation will not lie upon permittee's failure to use water to put out a fire within such time limit.

T-5.800 However, imposition of a time limit for completion of diversion works, storage of water and installation of fire equipment can be factually based, is therefore not arbitrary, and is valid.

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<b>Final Order Date:</b>	10/15/87 (D)	<b>Applicant:</b>	Crumpled Horn
<b>Case #/Type:</b>	51353-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	09/30/83	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	06/12/85	<b>Use:</b>	Irrigation

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A-16.7516 The criteria do not require as a precondition of permit issuance  
M-5.1129 that applicant prove it has an easement or present right to convey water across the property of another.

B-21.780 Burden of proof on applicant. [FO]

B-21.780 Objectors made a plausible showing that Brady Ditch seepage already  
U-14.1259 appropriated; applicant failed to prove otherwise. [FO]

W-1.870

D-21.310 Scheduling of hearings back to back within discretion of examiner; no evidence that this schedule prejudiced applicant's case. Motion for rehearing denied. [FO]

D-21.310 Introduction of a PhD. dissertation for the content thereof requires  
E-22.480 the author be available for cross-examination.

R-5.930 Motion to strike all portions of applicant's oral argument that did not pertain to issues raised in the applicant's exceptions denied. Held, ARM does not provide that written exceptions delimit the scope of oral argument. [FO]

S-15.920 Stream water which seeps into the stream bed belongs to the stream  
U-14.1259 and its appropriators. [FO]

S-20.110 A riparian stock water user cannot assert such use against irrigation appropriator. [FO]

U-14.1259 Applicant failed to overcome testimony that the full amount of water in Muddy Creek is required by downstream senior appropriators for stock use.

U-14.1274 Applicant seeking to appropriate water which has leaked from Brady  
W-1.870 Ditch into Muddy Creek for many years did not quantify amount of leakage or when it occurs. Held, applicant failed to show that water is physically available.

[Denied]

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<b>Final Order Date:</b>	10/21/87 REVOKED	<b>Applicant:</b>	Strickler
<b>Case #/Type:</b>	38493-s43QJ (R)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	10/16/87	<b>Use:</b>	Irrigation

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P-5.8021 Nothing done to develop permit and demonstrated lack of due diligence is cause to revoke.

P-5.8031 Extended hunting for the "right price" is not due diligence. Cannot grant extension.

[Permit revoked.]

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<b>Final Order Date:</b>	11/06/87 (G)	<b>Applicant:</b>	Chirico/Tortoreti
<b>Case #/Type:</b>	52843-g76G (E)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/17/83	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	09/30/87	<b>Use:</b>	Irrigation

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A-16.7516 Filing of a notice of completion instead of a request for extension  
P-5.8021 of time to complete when permittee did not understand the difference held not to lead to finding of lack of intent to appropriate water for undeveloped portion of project.

P-5.8031 Where permittee fails to perfect right, but has proceeded with due diligence, permit will not be revoked; rather an extension of time will be granted if permittee wishes to proceed.

P-5.8031 Permittee otherwise diligently worked on the project, but was unable to complete it due to unforeseen supervening circumstance (death in the family). Held, supervening circumstance good cause.

[Extension granted.]

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<b>Final Order Date:</b>	11/10/87 Not Mod.	<b>Applicant:</b>	Sears
<b>Case #/Type:</b>	783-g41G (R)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/23/73	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	11/05/87	<b>Use:</b>	Irrigation

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**B-21.780**            The Department has reasonable cause for requiring the permittee to  
**P-5.8021**            show cause why the permit should not be revoked.

**E-22.480**            Well documented findings recently made would normally be entitled to  
more weight than the perfunctory 1976 field report. However,  
testimony tended to show the more recent report in error, and the  
1976 report was prepared closer to date of completion.

**J-21.800**            The Department's decision on modification of a permit is  
discretionary.

[Permit not modified.]

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<b>Final Order Date:</b>	11/13/87 (G W/C)	<b>Applicant:</b>	Ulm
<b>Case #/Type:</b>	60049-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/21/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	08/27/86	<b>Use:</b>	Domestic/Stock

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**A-16.7567**            Amending application during hearing to increase size of offstream  
**D-21.310**            storage reservoir did not prejudice public or objectors.

**U-14.1259**            Where evidence shows that there is almost always insufficient water  
in the source from July 15 to September 15 to supply all existing  
appropriations, there is no unappropriated water in the source  
during that period.

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<b>Final Order Date:</b>	12/01/87 (D)	<b>Applicant:</b>	DeBuff
<b>Case #/Type:</b>	55880-40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/09/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	03/24/87	<b>Use:</b>	Irrigation

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**A-4.930**            Evidence and applicant's admission show his appropriation will  
**U-14.1259**            affect surface flow of Cold Spring Creek. However, there is no  
evidence that the resulting reduction would not aggravate water  
shortages experienced downstream from area affected by project.

**U-14.1274**            Full amount of groundwater is physically available during part of  
period of appropriation; later it fluctuates. However, applicant  
needs permit for full requested amount in order to appropriate full  
amount when available.

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<b>Final Order Date:</b>	12/11/87 REVOKED	<b>Applicant:</b>	Bickford
<b>Case #/Type:</b>	34125-s43B (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/01/81	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	11/30/87	<b>Use:</b>	Irrigation

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**P-5.8021**            Permittee's failure to obtain the diversion and distribution  
**P-5.8031**            equipment necessary due to continuing economic difficulties held  
insufficient cause not to revoke.  
[Permit revoked.]

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<b>Final Order Date:</b>	12/30/87 (G W/C)	<b>Applicant:</b>	Galt
<b>Case #/Type:</b>	G146094-41J (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	02/14/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/19/87	<b>Use:</b>	Irrigation

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**J-21.800** The legislature clearly intended that adjudication and change processing proceed simultaneously; therefore, changes in claimed rights may be granted prior to issuance of final decree, subject to modification thereafter.

**W-1.870** Interruption of the waste appropriator's source of supply cannot constitute an adverse effect to him as a matter of law, as his water right does not include the right to compel the generator of such waste to continue its generation.

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<b>Final Order Date:</b>	01/14/88 (G W/C)	<b>Applicant:</b>	Garrison
<b>Case #/Type:</b>	43104-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/08/81	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	05/08/87	<b>Use:</b>	Irrigation

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**B-21.780** Assuming examiner must consider the public trust, objectors averring violation of alleged "trust values" failed to establish that  
**E-14.9376** lowering of lake level by a few feet would impair such values. Held, there is no proof of trust violation, and permit must issue under mandatory terms of § 85-2-311, MCA.

**B-21.780** Assuming **arguendo** that the Department **qua** examiner must consider the public trust when hearing permit applications, omission from the  
**E-14.9376** statute of express requirement that applicant must prove no  
**J-21.80** violation of public trust may simply mean that it is the duty of those averring violation of the trust to prove violation.

**D-21.310** Held, untimely objectors may participate in the hearing subject to objection to their presentation of evidence not discovered by applicant.

**I-14.900** Failure to obey terms of interim permit not in itself grounds for  
**J-21.800** summary denial of provisional permit.  
**S-21.660**

**I-14.900** Failure to collect data pursuant to interim permit may result in  
**S-21.660** summary denial if necessary data was not otherwise collected.

**S-21.660** Examiner issuing interim permit did not enter findings and conclusions pertinent to decision on provisional permit, and parties would not stipulate to new examiner reviewing original hearing record in order to enter these. Held, fresh record must be compiled in **de novo** proceedings re the provisional permit. No summary determination based on old record will lie.

**U-14.120** Section 85-2-311(1)(a), MCA, requires that in at least some years, the amount of water applicant seeks is in the source throughout the proposed period of appropriation.

**U-14.1274** (Only water rights on lake are small stock water and domestic rights. **See** Findings.) Due to variations in the production of springs supplying it, lake levels may in some years fall below level of applicant's siphon, but in some years will remain at or above it.

Held, unappropriated water is available at applicant's point of diversion in at least some years.

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<b>Final Order Date:</b>	01/14/88 (G W/C)	<b>Applicant:</b>	Reisch
<b>Case #/Type:</b>	60155-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/17/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	05/11/87	<b>Use:</b>	Domestic

**U-14.120**           Where water shortages occur in July and August, but applicant has diverted the requested amount of water for some time prior to such shortages, the shortages cannot be attributed to his diversion. Thus, there must be at least as much "unappropriated" water in the source during that period as he has diverted in the past.

**U-14.1259**       Where Orsborn estimation predicts average annual flow of 9 cfs and all claims and permits on the source add up to 6 cfs, there are an average of 3 cfs of unappropriated water in the source. (However, facts here show water shortages in July and August, so average not reflective of whether unappropriated water is available throughout the period of use.)

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<b>Final Order Date:</b>	01/20/88 MODIFIED	<b>Applicant:</b>	Moholt
<b>Case #/Type:</b>	2134-g41I (R)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/03/74	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/24/87	<b>Use:</b>	Irrigation

**B-5.6979**           Department may not, after issuance of a permit, revoke same on the  
**P-5.800**           basis that the amount of water granted was excessive unless evidence which could not have been adduced at the time of permit issuance has been discovered.

**P-5.8032**       Permittee's failure to divert full flow allowed under terms of the permit for two consecutive years after the passing of the completion date set forth in the permit does not constitute failure to follow the permit.

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<b>Final Order Date:</b>	01/27/88 (D)	<b>Applicant:</b>	Meadow Lake Country Club Estates
<b>Case #/Type:</b>	55749-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	03/28/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	02/28/86	<b>Use:</b>	Domestic/Irrigation

**A-4.9395**           Evidence shows that applicant proposed diversion will lower the  
**B-21.780**           water levels in objectors' wells. Applicant did not prove that  
**E-24.4879**       objectors could reasonably operate their wells with lowered water. Held, applicant failed to prove no adverse effect.

**A-4.9395**           To support a finding of adverse effect, predicted drawdown  
**R-5.930**           must be matched with facts showing that such drawdown will will impair existing wells. [FO]

**A-4.9395**           Criticisms of Department report made for the first time at oral  
**R-5.930**           argument will only result in modification of finding based thereon if report shown to be entitled to virtually no weight, thus rendering the finding not based on substantial credible evidence. Finding that deep aquifer which applicant penetrates and shallow aquifer of objectors' hydrologically connected by "vertical leakage" sustained. [FO]

A-16.750      Applicant company was dissolved and its interests transferred to successor entities. Application treated as if original applicant continued to exist.

B-5.690      Storage for irrigation not a beneficial use in itself, but is  
S-20.720      necessary and incidental to the irrigation use.

B-5.6910      Golf course irrigation beneficial use.

B-5.6910      Aesthetic use of water assumed **arguendo** to be beneficial use. However, applicant did not show why keeping storage ponds filled with water during winter months would be an aesthetic use of water.

B-21.7835      Objector's testimony that his well was rendered nonfunctional by operation of well similar to one proposed by applicant, and the proximity of his well to objector's well was sufficient to create a plausible (**prima facie**) case of adverse effect to objector. Therefore, applicant had the burden to disprove such adverse effect. [FO]

R-5.930      No justification to reopen record in this case. [FO]

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<b>Final Order Date:</b>	02/11/88 (G W/C)	<b>Applicant:</b>	Sackman, Inc.
<b>Case #/Type:</b>	54911-g42M (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	01/26/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

A-4.930      Applicant did not sustain burden that proposed well would not  
A-4.9395      adversely affect wells of objectors. Held, because groundwater  
I-14.900      information is inherently difficult to obtain prior to drilling and pumping, interim permit grant proper.

E-22.408      Whether or not applicant has already expended money in furtherance of appropriation not material to decision. [FO]

E-22.408      Although farmer's testimony given great weight, here, expert testimony outweighs it because farmer's testimony nonspecific. [FO]

E-22.408      Whether a prospective appropriator could get water from another  
S-15.690      source is irrelevant. [FO]

E-24.4879      Appropriators are not entitled to tie up a source of water simply to  
M-5.110      avoid having to upgrade their means of diversion. [FO]

A-4.9394      Exception to proposal alleging that even interim permit would  
I-14.900      adversely affect objectors because it would pull alkaline water into aquifer held not probable based on facts in record. [FO]

[Interim testing done. Second proposal issued proposing to grant based on interim testing conclusion of no adverse effect. Second final order issued granting provisional permit.]

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<b>Final Order Date:</b>	02/29/88 (G W/C)	<b>Applicant:</b>	Hern
<b>Case #/Type:</b>	61197-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/21/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/13/87	<b>Use:</b>	Fish/Stock

A-4.930      No adverse effect where bypass flow which adequately supplies needs of downstream stock use is required.

A-16.7567           Where there is not sufficient unappropriated water available to  
U-14.120           supply the requested amount, but evidence shows the amount which is  
                      available will suffice for the use proposed, the Department may  
                      issue a permit for less than the amount requested.

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Final Order Date:	03/14/88 (G W/C)	Applicant:	Worf
Case #/Type:	V111165-76H(S) V151753-76H(S)	Regional Office:	Missoula
Application Date:	04/01/1895	Examiner:	Scott
Hearing Date:	03/13/86	Use:	Irrigation

A-4.9348.00       Change from flood to sprinkler irrigation does not in itself  
A-4.9379       increase burden on source, as the water which was diverted and then  
                      returned after flood irrigation, need not be diverted at all for  
                      sprinkler irrigation.

A-4.9348.10       Transfer of a portion of a right to more acreage than that portion  
A-4.9348.10       of the right historically irrigated may result in an enlargement of  
                      the existing right which could adversely affect appropriators with  
                      later priority dates by increasing net source depletion.

A-4.9348.10       A mere allegation of salvage is insufficient to prove net depletion  
                      of the source will not increase when acreage is expanded.

A-4.9348.10       As increasing the acreage to which a portion of a right is  
B-21.780       appurtenant very likely will increase the amount of water consumed  
                      for irrigation, a change cannot issue absent proof that net source  
                      depletion will not increase.

A-4.9379           Water right does not include the right to recapture return flows  
E-24.4894       where the original appropriators did not commence recapture within a  
                      reasonable time after initiation of appropriation.

E-24.4810       Absent proof of intent to abandon, claimed rights treated as  
                      legitimate even if unused for a long time.

J-21.800           No change authorization is necessary for mere conversion from flood  
                      to sprinkler irrigation.

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Final Order Date:	04/15/88 (G W/C)	Applicant:	Town
Case #/Type:	61978-s76LJ (P)	Regional Office:	Kalispell
Application Date:	12/31/85	Examiner:	Scott
Hearing Date:	06/08/87	Use:	Irrigation

A-4.9394           Where appropriated water enters septic field which may drain into  
                      another domestic water supply, conditioning permit to require  
                      compliance with health regulations is sufficient to satisfy  
                      criterion of no adverse effect.

A-16.7516       The law does not require applicant to use the water personally, only  
                      that it be used.

A-16.7521       Land description need not be exact as long as reasonably precise.

B-5.6979           Department's estimate of what amount of water is reasonable for a  
E-22.480       particular use is **prima facie** evidence of the maximum amount which  
                      can be applied without waste. If applicant applies for amounts  
                      greater than this estimate, he must prove the excess will not be  
                      wasted.



**E-22.480** Prior use of diversion works is admissible if relevant to ascertain  
**M-5.110** ability of works to adequately function. Whether such prior use was  
 "illegal" is not relevant.

**J-21.800** Department may grant permit before completion of statewide  
 adjudication.

**U-14.1259** Where only 20% of flow is ever simultaneously diverted from a source  
 under existing rights, 80% of water is legally available.

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<b>Final Order Date:</b>	04/15/88	<b>Applicant:</b>	Fairmont Hot Spgs.
<b>Case #/Type:</b>	60551-g76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/05/85	<b>Examiner:</b>	Compton
<b>Hearing Date:</b>	01/25/88	<b>Use:</b>	Irrigation/Domestic

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**A-4.930** Where applicant has pumped existing well as requested in the  
 application for two years, and objector has had no trouble obtaining  
 water from his well, evidence is sufficient to prove no adverse  
 effect to objector's right.

[Exceptions filed; no modification of holdings.]

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<b>Final Order Date:</b>	04/15/88 (G W/C)	<b>Applicant:</b>	Fairmont Hot Spgs.
<b>Case #/Type:</b>	65936-g76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/13/87	<b>Examiner:</b>	Compton
<b>Hearing Date:</b>	01/25/88	<b>Use:</b>	Recreation

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**B-5.6979** Where permit is to replace use of claimed right (which may not be  
 verified on adjudication), permit must be conditioned to prevent use  
 of both rights.

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<b>Final Order Date:</b>	04/27/88 (G W/C)	<b>Applicant:</b>	Cobler
<b>Case #/Type:</b>	60194-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/12/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/02/87	<b>Use:</b>	Irrigation

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**A-4.930** Having to call for water does not constitute adverse effect per se.

**A-16.7567** Where place of use reduced by application amendment, flow and volume  
**B-5.6979** must also be reduced.

**U-14.1259** The fact that more flow arrives at Kalispell than is released by FWP  
 from Ashley Lake upstream (except in July and August) indicates that  
 the water needs of all users in the interim are being met, and that  
 unappropriated water is available in the source of supply except in  
 July and August. However, evidence that objectors can never obtain  
 sufficient water in July and August shows that there will never be a  
 year when applicant would not be called during that period. There is  
 thus no unappropriated water in the source during that period.

[Exceptions filed; no modification of holdings.]

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<b>Final Order Date:</b>	05/10/88 (G W/C)	<b>Applicant:</b>	Kolbeck Ranches
<b>Case #/Type:</b>	56793-s76GJ (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/17/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	07/08/87	<b>Use:</b>	Irrigation

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**B-5.6979** Where amounts applied far exceed Department estimates of reasonable  
**B-21.780** need, applicant must present evidence justifying the excess.

**B-5.6979** Diversion under permit for supplemental water is restricted to  
**S-21.760** amount reasonably necessary less the amount diverted under the  
claimed right.

**M-5.110** Where in the past applicant has been able to divert using a ditch  
because down-ditch users have not required their water, and the  
capacity of the ditch is insufficient to carry both the applied for  
water and theirs, and the circumstances of the down-ditch users are  
liable to change in the future necessitating their resumed use of  
the ditch, the means of diversion cannot be said to be adequate.

**U-14.1259** Where record shows that water, formerly not called for, will most  
probably be legitimately called for in the future, that water must  
be considered appropriated (legally unavailable).

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<b>Final Order Date:</b>	05/17/88 (D)	<b>Applicant:</b>	Hoven
<b>Case #/Type:</b>	64463-s43D (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	05/21/87	<b>Examiner:</b>	Rolf
<b>Hearing Date:</b>	02/04/88	<b>Use:</b>	Stock Water

**U-14.1259** Applicant failed to show that there was ever a time when all creek  
water would not be needed by prior appropriator. Held, insufficient  
proof that unappropriated water exists in source. [Permit denied.]

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<b>Final Order Date:</b>	05/31/88 (D)	<b>Applicant:</b>	Hadley
<b>Case #/Type:</b>	60662-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/04/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	12/11/87	<b>Use:</b>	Irrigation

**A-16.7567** Department may modify requested period of appropriation so that  
shorter period is granted, so long as applicant's burden under 85-2-  
311 is met during the shortened period.

**U-14.120** To comply with § 85-2-311(1)(a), MCA, applicant must prove that, at  
least in some years, sufficient unreserved water will be physically  
available at the point of diversion to supply the amount requested  
throughout the period of appropriation, and that at least in some  
years, no legitimate calls for water will be made on him by a senior  
appropriator.

[Exceptions filed; no modification of holdings. Permit denied.]

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<b>Final Order Date:</b>	06/01/88 (G W/C)	<b>Applicant:</b>	Dakolios
<b>Case #/Type:</b>	63575-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/19/86	<b>Examiner:</b>	Larson
<b>Hearing Date:</b>	03/22/88	<b>Use:</b>	Fish Pond

**U-14.1259.70** Applicant applied for 300 gpm up to 3 acre-feet per annum to make up  
**W-1.870** for evaporation and seepage in onstream reservoir. He did not apply  
for nonconsumptive flow through. Although claims on source indicate  
all available water had been appropriated, seepage evidently  
returned to source (so that portion of proposed use nonconsumptive)  
and examiner apparently viewed small evaporative use (consumptive)  
as having only **de minimus** effect on source. Held, 300 gpm up to 3  
acre-feet per annum unappropriated water available. [Permit  
granted.]

<b>Final Order Date:</b>	06/20/88 (D)	<b>Applicant:</b>	Bruce
<b>Case #/Type:</b>	63456-s41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/02/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/09/88	<b>Use:</b>	Fish Pond

**U-14.1259.70** Onstream fish pond will consume some water. Therefore, at a minimum, applicant must provide substantial credible evidence that unappropriated water is available for the smallest estimated consumptive use of the project, as well as for the nonconsumptive flow through. No flow data was presented. [Permit denied.]

<b>Final Order Date:</b>	06/22/88 (G W/C)	<b>Applicant:</b>	Hilltop Angus
<b>Case #/Type:</b>	55943-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	08/15/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/11/88	<b>Use:</b>	Irrigation

**A-4.930** No evidence to make objector's allegation of adverse effect (that  
**B-21.7835** applicant's diversion during high water would cause the source to dry up sooner) plausible. Applicant need not disprove.

**T-5.800** Objectors require stock water continuously at their point of  
**U-14.1259** diversion. The flow of Wolf Creek fluctuates widely. Therefore, there will never be a year when applicant would not be called. However, the mean flow of Wolf Creek is 6 cfs. Thus, if applicant is only allowed to divert at times that there are more than 6 cfs in the source, there will be some years when he will not be called for water. Held, § 85-2-311(1)(a), MCA, met if restriction imposed.

[Permit granted with conditions.]

<b>Final Order Date:</b>	06/23/88 (G W/C)	<b>Applicant:</b>	Hughes Ranch
<b>Case #/Type:</b>	23770-41F (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	06/12/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	03/24/88	<b>Use:</b>	Irrigation

**A-4.9348.20** No intervening points of diversion between old point of diversion and new point of diversion. No evidence of adverse effect to other rights.

**J-21.800** Water court does not have jurisdiction to "approve" change in point of diversion made after 1973; that is within exclusive jurisdiction of Department.

**J-21.800** Whether move of right from one ditch to another will require  
**M-5.1129** expanded easement irrelevant as outside of Department jurisdiction.

**J-21.800** Department has jurisdiction to make findings and conclusions re  
**O-2.490** objections.

**O-2.490** Objections filed were sufficient to meet requirements of statute: they were timely, stated the name and address of each objector, and each listed facts tending to show one of the listed bases for objection. Motion to dismiss objection denied.

<b>Final Order Date:</b>	07/21/88 (G W/C)	<b>Applicant:</b>	Perkins
<b>Case #/Type:</b>	60567-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/12/85	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/17/88	<b>Use:</b>	Irrigation

**M-5.110** Adequacy of operation of onstream reservoir includes accountability  
**S-20.720** for passing upstream stored water and natural flow to downstream users. This can be accomplished by ditching the natural flow around the dam or by measuring equal flows at the inlet and outlet.

**S-20.720** If cannot convey stored water to place of use, may divert natural flow of stream if an equal amount of stored water is made available to rightful appropriators of natural flow. Section 85-2-413, MCA.

**S-20.720** It is permissible to use the source to convey water from an onstream reservoir to a lower point of diversion. However, where the district court has determined that in travelling from onstream reservoir to downstream point of secondary diversion there is a loss of 10% of released water to evaporation and seepage, permit conditioned so that applicant must reduce his diversion at the secondary point of diversion by 10% of the amount released from the reservoir.

**U-14.120** Where water to be diverted between November and April for storage, and evidence shows that water is then physically available and that in most years applicant will not be called during this period by seniors, § 85-2-311(1)(a), MCA, is satisfied.

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<b>Final Order Date:</b>	08/18/88 (G W/C)	<b>Applicant:</b>	Ridgewood
<b>Case #/Type:</b>	12826-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/16/77	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	09/22/86	<b>Use:</b>	Domestic
<b>Oral Argument Date:</b>	02/23/88		

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**A-4.9395** Only data on record, pump test results, does not support a finding that there is any significant hydraulic connection between the fracture system that feeds applicant's well and that which feeds objectors'.

**A-4.9395** Cannot grant permit for amount requested as failure to conduct test at rate requested by applicant (75 gpm) but only at 35 gpm shows only that hydraulic connection between systems is insignificant at 35 gpm.

**A-4.9395** Winter test pump will show hydraulic connection between systems, if  
**R-5.930** one exists, despite "no load" situation on groundwater. Finding of minimal connection sustained. [FO]

**A-4.9395** Existence of certificate in application for other pumping from  
**T-5.800** system complicates matters. Combined pumping may adversely affect objectors. Therefore, applicant may operate both wells simultaneously, but may only produce hereunder the extent he does not under certificate.

**E-22.480** Failure to do pump test during period of maximum withdrawal by objectors does not invalidate test results; **au contraire**.

**E-22.480** Testimony of one witness not stricken on review, as assessing the  
**R-5.930** credibility of a witness is a matter within examiner's discretion. [FO]

**M-5.110** Well cannot produce requested amount. Held, means of diversion  
**U-14.1274** inadequate.

**R-5.930** New evidence inadmissible at oral argument. [FO]

R-5.930 Finding of examiner as to adverse effect held not clearly erroneous even though evidence in record indicated possible adverse effect from similar unrelated well in past. [FO]

R-5.930 Overruled examiner's proposed condition allowing use of both permit and certificate simultaneously as "improper"; rather, they must be used alternately. [FO] [?]

U-14.120 Applicant proved there is unappropriated water in source although not as much as requested.

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<b>Final Order Date:</b>	08/23/88 (G W/C)	<b>Applicant:</b>	East Gate Water Users Assn.
<b>Case #/Type:</b>	57025-g41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/18/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/17/87	<b>Use:</b>	Municipal

A-4.930 Applicant showed maximum aquifer drawdown would be .12 foot. No  
B-21.780 objector alleged that such drawdown would adversely affect his right. Therefore, held no adverse effect.

I-14.900 Held, proper to allow testing under interim permit because of the peculiarly inaccessible nature of groundwater information.

U-14.1274 Where record shows that pumping of all four of applicant's wells may cause sufficient draw down in two of those wells so that water unavailable, § 85-2-311(1)(a), MCA, not met.

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<b>Final Order Date:</b>	08/24/88 (D)	<b>Applicant:</b>	Unruh
<b>Case #/Type:</b>	1819-s40J (E)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/21/76	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/26/88	<b>Use:</b>	Irrigation

P-5.8031 Permittee of 1974 did nothing on the project in 14 years citing financial hardship. However, 44 junior permittees had perfected. Held, no due diligence and no physical factors beyond permittee's control. [Extension denied.]

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<b>Final Order Date:</b>	08/24/88 (G W/C)	<b>Applicant:</b>	Blair
<b>Case #/Type:</b>	56031-s41S (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/07/84	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/11/88	<b>Use:</b>	Irrigation

A-4.930 No evidence to make objector's allegation of adverse effect (that  
B-21.7835 applicant's diversion during high water would cause the source to dry up sooner) plausible. Applicant need not disprove.

A-16.7576 Lack of statement of requested flow rate in public notice held  
D-21.310 nonprejudicial.

T-5.800 Senior appropriator Hilltop Angus Ranch must bypass 6 cfs (**see**  
U-14.1259 55943) and it uses 1.67 cfs. Further, there will never be a year when applicant is not called as the flow of Wolf Creek fluctuates widely. However, if applicant is only allowed to divert at times that there are more than 7.67 cfs in the source, there will be some years when he will not be called for water. Held, if restriction imposed, § 85-2-311(1)(a), MCA, met.

[Permit granted with conditions.]

<b>Final Order Date:</b>	08/24/88 (D)	<b>Applicant:</b>	Schnee/Waggoner
<b>Case #/Type:</b>	64912-s41J (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	08/29/87	<b>Examiner:</b>	Larson
<b>Hearing Date:</b>	05/24/88	<b>Use:</b>	Mining

**B-15.690**      Applicant must have a fixed and definite plan to appropriate all of the water he requests. Here, applicant satisfied that requirement for only part of requested appropriation. Application reduced to conform with present intent.

**B-21.7873**      Because water will flow through settling ponds and only return to source via seepage through the ground, there will probably be a significant delay in return flow. Applicant did not prove otherwise, and because such delay would distort the flow regime which downstream appropriators' rely on, applicant failed to prove no adverse effect.

**E-22.408**      Opinions and recommendations in letter from Department of Health and Environmental Sciences regarding water quality held inadmissible hearsay. However, notice was taken of the fact that samples were taken and analyzed.

**E-22.408**      Field inspection report conducted by state agency held admissible, although hearsay.

[Permit denied.]

<b>Final Order Date:</b>	08/26/88 (D)	<b>Applicant:</b>	Unruh
<b>Case #/Type:</b>	3051-s40J (E)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	07/14/76	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/26/88	<b>Use:</b>	Irrigation

**P-5.8031**      Nothing done to develop appropriation in 14 years. No due diligence.

**P-5.8031**      Insufficient funds is not excuse for failing to proceed.

<b>Final Order Date:</b>	09/20/88 (D)	<b>Applicant:</b>	Lee, Joe R.
<b>Case #/Type:</b>	51232-g41O (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	01/12/83	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	04/15/88	<b>Use:</b>	Irrigation

**A-4.9383**      Evidence that applicant's proposed pit well is 1.25 to 1.5 miles from objector's canal which runs through gravelly soil held sufficient to require that applicant prove that such well will not induce seepage from the ditch.

**E-24.408**      Request to leave record open for submission of additional evidence denied on grounds that applicant had four years to prepare his case and because the record had already been reopened once.

**E-24.480**      Department has no duty to research its records for applicant preparing case. Applicant must specifically identify records he wants reproduced.

**U-14.1274**      Physical presence of water at point of diversion is not by itself proof of unappropriated water.

**U-14.1274**      Uncontradicted evidence that aquifer may not produce requested amount show amount requested not available.

[Denied.]

<b>Final Order Date:</b>	09/22/88 (G W/C)	<b>Applicant:</b>	DeBruycker
<b>Case #/Type:</b>	G136329-410 (C) G136330-410 & G136331-410	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/01/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/10/86	<b>Use:</b>	Irrigation
<b>A-4.9348.00</b>	Appropriators are entitled to maintenance of original stream conditions unless the appropriation can be reasonably exercised under changed conditions. In order that such determination can be made, change applicant must provide sufficient information as to historic consumption and pattern of use.		
<b>B-21.780</b>			
<b>E-24.4831</b>			
<b>A-4.9348.00</b>	In addition to proving change will not consume a greater volume of water than historically consumed, applicant must prove that it will not consume greater flow, if an increase in source flow depletion will adversely affect other appropriators.		
<b>A-4.9348.00</b>	If it historically followed a certain pattern of use, applicant must show either that the pattern will not change, or that such change will not adversely affect other appropriators.		
<b>Final Order Date:</b>	09/23/88 (G)	<b>Applicant:</b>	Dippel
<b>Case #/Type:</b>	28025-s76H (E)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	07/01/88	<b>Use:</b>	Irrigation
<b>P-5.8031</b>	Although this was a close call, examiner determined that applicant finding a contractor and having plans drawn up one year, searching for another contractor the next year because the first one increased the price, and also staking off the construction site that year was sufficient to show due diligence. [Extension granted.]		
<b>Final Order Date:</b>	10/28/88	<b>Applicant:</b>	Careless Creek
<b>Case #/Type:</b>	W1339988-40A (D) W1339989-40A (D) W139988-40A (C) W139989-40A (C) P50641-40A (C) 50641-40A (G)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	02/04/88	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/21/88	<b>Use:</b>	Irrigation
<b>A-4.9348.20</b>	Where there is water at new point of diversion more often than at old point of diversion, and purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right.		
<b>B-21.780</b>			
<b>E-24.4831</b>	Where applicant has presented duly filed claims of existing right, and objector presented no evidence refuting existence of same, the contents of said claims are accepted as the true parameters of the existing right.		

(W139988 & 139989 Denied.)

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<b>Final Order Date:</b>	11/01/88 (IO)	<b>Applicant:</b>	McBride
<b>Case #/Type:</b>	64545-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/23/86	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	07/29/88	<b>Use:</b>	Domestic

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A-4.9395            Because of the possibility of long term depletion of the aquifer,  
T-5.800             applicant may only appropriate therefrom if he augments the aquifer.  
U-14.1274

A-4.9395            The hastening of a foreseeable adverse effect (long term aquifer  
U-14.1274             depletion) is in itself an adverse effect.

B-21.7835           Appropriation is from temporary controlled ground water area.  
Therefore, in addition to regular permit criteria, applicant must  
satisfy criterion set in the order establishing the T.C.G. area.  
(Examiner then analyzes what said criterion requires.)

E-22.408            Uncontradicted expert testimony that there will be no well  
interference is clear and convincing evidence.

[Final decision postponed for three years pending outcome of aquifer  
recharge efforts.]

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<b>Final Order Date:</b>	11/03/88 (D)	<b>Applicant:</b>	Rasmussen
<b>Case #/Type:</b>	G211081-76LJ	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/04/84	<b>Examiner:</b>	Siroky
<b>Hearing Date:</b>	08/25/88	<b>Use:</b>	Irrigation

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E-24.4810           Where SB #76 claim filed late, there is a conclusive presumption of  
abandonment of the water right concerned.

E-24.4831           A change authorization cannot be granted where there is no water  
J-21.800             right to change.

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<b>Final Order Date:</b>	11/04/88 (G)	<b>Applicant:</b>	Hannah
<b>Case #/Type:</b>	2482-s41S (E)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/03/74	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	06/27/88	<b>Use:</b>	Irrigation/Stock

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B-21.780            Necessity of showing due diligence was always part of showing good  
P-5.8031             cause for extension. Therefore, expression of same in 1987 version  
of statute does not heighten permittee's burden of proof, and does  
not impair a vested right.

E-22.480            Objector's evidence as to water availability not proper or relevant  
at extension hearing.

P-5.8031            Search for a good deal on construction material not in itself due  
diligence. However, steady efforts to obtain financing for the  
project does constitute due diligence.

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<b>Final Order Date:</b>	11/04/88 (D)	<b>Applicant:</b>	DeBruycker
<b>Case #/Type:</b>	58133-s410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/01/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	07/10/86	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	03/02/88		

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A-4.9392            Applicant's onstream reservoir, already in place, and from which he  
B-21.780             continually pumps pursuant to other rights, captures the entire flow



**M-5.110** of the source except what overflows dam. This means of diversion  
**S-20.7** together with downstream objector's testimony that before the  
impoundment, there was flow available for their junior rights in the  
summer, but that now there is none, held sufficient to raise issue  
of adverse effect to objector's downstream junior rights due to  
inadministrable nature of appropriation works. Applicant's naked  
assertion that the alleged shortage was due to abnormally dry years  
held insufficient to prove no adverse effect.

**T-5.800** Where a relatively complex plan of operation is necessary in order  
that a permit be administrable, and applicant does not provide that  
plan, the Department will not unilaterally impose its own plan as a  
condition placed on the permit. [FO] [Appealed to District Court.]

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<b>Final Order Date:</b>	11/09/88 (G W/C)	<b>Applicant:</b>	Clarke
<b>Case #/Type:</b>	60893-g76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/22/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/09/87	<b>Use:</b>	Irrigation

**A-4.930** Failure of senior surface appropriators to complain to applicant  
about a reduction in the spring which supplied them with water is  
not indicative of lack of adverse effect when seniors did not know  
about the connection between his well and the spring.

**A-4.930** Where there is no indication in the record that objector's means of  
**B-21.780** diversion (impounding water produced by a spring) is unreasonable,  
and where the evidence otherwise shows that the flow of the spring  
may be reduced by applicant's well to a point where objectors can no  
longer divert, applicant must prove that such alleged effect will  
not occur. Here, applicant failed to make such proof.

[Exceptions filed; order modified, but no modification of holdings.]

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<b>Final Order Date:</b>	11/22/88 (D)	<b>Applicant:</b>	Bureau of Land Management/USDI
<b>Case #/Type:</b>	64800-s40B (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/06/87	<b>Examiner:</b>	Jones
<b>Hearing Date:</b>	05/17/88	<b>Use:</b>	Fish/Stock

**A-4.930** Applicant proposes to install only a trickle tube for water release  
**A-4.9312** from its dam. However, evidence shows that without a better drainage  
device in applicant's dam, objector downstream would be deprived of  
water because applicant could not release water when it was called  
for. Held, dam design inability to respond to call would adversely  
affect objector. [Permit denied.]

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<b>Final Order Date:</b>	12/08/88 (G W/C)	<b>Applicant:</b>	Sowers
<b>Case #/Type:</b>	65779-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/05/87	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	08/31/88	<b>Use:</b>	Irrigation

**T-5.800** Where objectors and applicant have entered into a stipulation for  
inclusion of a condition in any permit issued, said stipulation is  
binding on applicant and the condition will be included if it  
furthers compliance with the statutory criteria.

**U-14.1274** If evidence shows that only 6 gpm are physically available, a permit  
may not issue for more than that, though applicant has requested  
more in its application.

<b>Final Order Date:</b>	12/12/88 (D)	<b>Applicant:</b>	Zinne Brothers
<b>Case #/Type:</b>	27941-s40A (E)	<b>Regional Office:</b>	Lewistown
	50642-s40A (E)		
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	04/22/88	<b>Use:</b>	Irrigation

A-4.930 Refusal to require bypass flow sustained. [FO]  
R-5.930

E-22.480 Prior decisions of the Department relating to the existence of  
S-21.6621 unappropriated water in the source are **prima facie** proof regarding  
U-14.120 existence thereof. No collateral estoppel however, as prior findings  
are subject to challenge. [FO]

P-5.8031 Failure to proceed with due diligence because permittee does not  
wish to risk investing money in a project that he may or may not be  
able to utilize in the future depending on the outcome of the  
adjudication, and whether there is a promising assurance that there  
will be adequate flow, held not good cause for granting of  
extension.

R-5.930 Examiner's findings only reversed if clearly erroneous.

R-5.930 No new evidence allowed at review stage.

R-5.930 Finding of Fact #2 held clearly erroneous. [FO]

U-14.1259 Imposes "Musselshell" conditions. [FO]  
[Extension denied.]

<b>Final Order Date:</b>	12/15/88 (D)	<b>Applicant:</b>	Ohs
<b>Case #/Type:</b>	63796-s41G (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	02/26/87	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	02/11/88	<b>Use:</b>	Diversion

B-21.7835 Clear and convincing proof is that degree of proof which is more  
H-9.390 than a preponderance of evidence but less than beyond a reasonable  
L-1.790 doubt.

E-22.408 Applicant requested problem with water measurements be overlooked as  
objector had not pointed it out. Held, Department has duty to  
examine evidence independent of objector's actions. Request denied.  
[FO]

L-1.790 Evidence showing sufficient flows to provide water to applicant at  
U-14.1274 point below confluence of tributaries, when actual diversion will be  
made upstream of such confluence, held not clear and convincing that  
sufficient water physically available for appropriation.

P-21.150 Finding, which implied that FERC FONSI not dispositive of the  
environmental impact issue in this case, contested by applicant.  
Held, because application was for more water than the FONSI had  
contemplated, implication of finding correct. [FO]

R-5.930 Applicant moved record be reopened for receipt of evidence of flows  
above confluence. No showing that this evidence could not reasonably  
have been presented earlier. Motion denied. [FO]

U-14.1274 Even if only "adverse effect" of insufficient water physically available would be on applicant, no permit may issue because of § 85-2-311(1)(a), MCA. [FO]

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<b>Final Order Date:</b>	12/16/88 (G W/C)	<b>Applicant:</b>	Parkening
<b>Amended Final Order:</b>	09/29/89		
<b>Case #/Type:</b>	49636-s41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	12/06/82	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	04/25/88	<b>Use:</b>	Diversion

A-4.9348.48 Proposed project is substantially nonconsumptive; however, permit  
T-5.800 must be conditioned to require measurements so as to ensure that it remains so.

A-16.7567 Although evident at hearing that applicants can divert more water than applied for, permit cannot be granted for more than applied for.

D-21.310 Affidavit of objector accepted in lieu of appearance; applicant  
E-22.480 allowed written cross-examination.

R-5.930 Final Order conditions modified by amending Final Order; this  
T-5.800 pursuant to stipulation of the parties.

U-14.120 Unappropriated water is water physically available at the point of diversion and not then needed by downstream seniors.

[Granted.]

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<b>Final Order Date:</b>	12/16/88 (G W/C)	<b>Applicant:</b>	Hollenback
<b>Case #/Type:</b>	63377-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/15/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/19/88	<b>Use:</b>	Irrigation

A-16.7567 Evidence shows that unappropriated water is available during a  
B-15.690 part of the period of use. However, there is no evidence regarding  
U-14.120 whether applicants can beneficially use the water for irrigation if the period of appropriation is reduced to those months. Cannot modify.

A-16.7567 At oral argument, applicants stated that they could beneficially  
R-5.930 irrigate during shorter period. This evidence admitted to fill gap in hearing record. [FO]

E-22.480 Any nonconformance with R.C.M. 89-910, renders a notice of  
E-24.480 appropriation inadmissible as evidence. Objector's predecessor did not conform. Held, the parameters of the right must be determined from evidence of actual use of the water. (Evidence indicates objectors have 90 gpm use right.)

E-24.4810 Department did not determine that part of objector's right had been abandoned; the evidence showed that water had never been beneficially used in the summer, and there was no evidence of continuing intent to establish such summer use. Objector did not sufficiently show that he had a summer water right which could be adversely affected. [FO]

E-24.4820 Stock water rights are in certain cases and in this case exempt from

**J-21.800** requirements of SB #76. No voluntary filing was made. Held, water court has no jurisdiction in this matter. Certification improper. [FO]

**E-24.4831** Since exempt rights are not described through the claims process, it is necessary that the Department take testimony regarding the parameters of the objector's right in order to determine whether there will be adverse effect. [FO]

**U-14.1259** Evidence shows water physically available, but that there is not sufficient water to supply objector's right and the requested amount. Section 85-2-311(1)(a) not met for full period of use.

[Proposal submitted to deny; appealed to District Court; remanded to Department for rehearing. Summer permit granted]

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<b>Final Order Date:</b>	12/29/88 (D)	<b>Applicant:</b>	Goffena
<b>Case #/Type:</b>	61293-s40C (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	09/19/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	07/15/88	<b>Use:</b>	Irrigation

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**A-4.930** Salinization of a creek from which water is diverted for stock use  
**A-4.9394** is an adverse effect to such water rights if it renders the water unpotable for stock use.

**A-4.9325** Assertion that any further appropriations from a source will  
**E-24.4879** adversely affect stock appropriators by depriving them of historic  
**M-5.110** recharge to potholes from which stock drink held untenable.  
 Objectors cannot require the entire flow of the stream for ease of obtaining a small percentage of its water when they can exercise their senior priority to obtain this water. Although calling the source may be relatively difficult due to the unpredictable timing and duration of flows in the creek, such difficulty is part and parcel of holding a water right in that area.

**M-5.110** Where dam must be able to bypass the flow of the stream in order to  
**S-20.720** to respond to the calls of downstream seniors, but where there is no evidence of how much flow the design of the dam will allow to pass, applicant has failed to prove the appropriation works adequate.

**P-18.720** The effect of potential seep on soils is not an adverse effect to a water right and is thus irrelevant in these proceedings.

**S-20.720** Where water is to be stored for later use, so long as there is  
**U-14.1259** sufficient unappropriated volume available in the source during the period of storage to supply the proposed use, the magnitude of downstream appropriations in terms of flow rate is immaterial to the question of whether § 85-2-311(1)(a) is satisfied.

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<b>Final Order Date:</b>	01/03/89 (G W/C)	<b>Applicant:</b>	Scharbauer, d/b/a Western Montana Sports and Fitness Center
<b>Case #/Type:</b>	062593-g76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/05/86	<b>Examiner:</b>	Beck
<b>Hearing Date:</b>	05/25/88	<b>Use:</b>	Commercial/ Irrigation

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**A-4.9394** In this instance, Department of Health and Environmental Sciences' approval of waste disposal is sufficient proof of no adverse effect to water quality.

**A-4.9395**  
**B-21.780** Where objector alleged his well will be interfered with by the one to two-foot drawdown which applicant has shown may occur, but does not state why he could not reasonably exercise his water right under the changed conditions, he has not met his burden of production.

**B-5.6979** Because applicant presently has a certificate of water right with sufficient volume for all contemplated commercial needs, only additional flow for those needs is granted.

**B-5.6979** To ensure that the amount of water requested is put to beneficial use, permit conditioned so that total volume applied to place of use under permit is reduced by volume applied pursuant to other rights already appurtenant to that place of use.

**B-21.780** Applicant's initial burden is to produce information re the specifics of the proposed use and the anticipated effect on the source. Objector must then describe his right with particularity and allege how he will not reasonably be able to exercise his right under the changed conditions. If objector thus meets his burden of production, then applicant must prove by substantial credible evidence that the anticipated adverse effect will not occur. If objector does not meet his burden, and the applicant's description does not show adverse effect on its face, applicant's burden of proof is satisfied by his initial production.

**U-14.1259** If percolating groundwater is physically available at the well head, it is unappropriated within the meaning of the statute if there is no adverse effect to other wells in the aquifer. [Caution: Statement in proposal for decision at p. 24 that diversion of appropriated water always adversely affects prior appropriators is true only where their seniority cannot be readily exercised, as in the case of percolating groundwater.]

[Exceptions filed; no modifications to holdings.]

<b>Final Order Date:</b>	01/12/89 (D)	<b>Applicant:</b>	Moss
<b>Case #/Type:</b>	60073-s76L (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/09/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/25/88	<b>Use:</b>	Fish Pond

**A-4.9312**  
**B-21.780**  
**S-20.720** Where evidence shows that it is possible that alleged nonconsumptive pond use of water may well be consumptive due to significant seepage from the pond, but applicant failed to prove otherwise, "nonconsumptive" permit cannot issue as (the nonconsumptive permit's **de facto** "immunity" from calls) could adversely affect objectors.

**B-21.780** Amount of information required of applicant is not necessarily proportional to the size of the project; there is a minimum amount of information required regardless of project size.

**E-22.480**  
**M-5.110** Where applicant merely indicates that "he will install whatever is required" but does not present a design and plan of operation for the appropriation works, he has not proved that the appropriation works are adequate.

**E-24.4848**  
**J-21.800** Where application denied, it is not necessary to reach jurisdictional argument raised by United States or Indians.

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<b>Final Order Date:</b>	01/23/89 (G)	<b>Applicant:</b>	Rehbein
<b>Case #/Type:</b>	39787-s76M (E)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/18/81	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	04/12/88	<b>Use:</b>	Irrigation/Stock

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**P-5.8031** Statutory requirement that there be "good cause" for granting an extension of time to perfect a new use permit means that permittee show that he has exercised due diligence toward perfecting the appropriation but has nonetheless been unable to do so. [Discussion: Principle derived from common law substrate of Water Use Act requiring that there be due diligence to invoke relation back of priority of the appropriation to commencement/filing date.]

**P-5.8031** Review of the record shows some support for applicant's statement made at oral argument that they did not know of the completion deadline. Held, although there is no due diligence, applicants' ignorance of the perfection deadline is good cause to grant an extension.

**P-5.8031** Permittees failed even to commence project until one month before deadline. Their behavior held not due diligence.

[Accordingly, examiner proposed denial of extension. Proposal reversed in Final Order.]

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<b>Final Order Date:</b>	01/24/89 (G W/C)	<b>Applicant:</b>	Evans
<b>Case #/Type:</b>	64600-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/15/87	<b>Examiner:</b>	Beck
<b>Hearing Date:</b>	03/08/88	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	07/07/88		

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**D-21.310** Objector did not answer discovery requests, but questions asked were  
**E-22.480** general, the issue was not raised at the hearing, and no specific prejudice was alleged at oral argument. Applicant has not demonstrated that he was prejudiced by objector's failure to make discovery. [FO]

**R-5.930** Examiner's finding that unappropriated water is unavailable from May 1 to July 15 held not based on substantial credible evidence. Modified. [FO]

**U-14.1259.25** Once control of water imported into a drainage has been relinquished by the importer, the corpus of the water becomes part of the drainage and is subject to priorities thereon just like water naturally part of that drainage.

**U-14.1259** Applicant failed to prove there will ever be a year when he would not be called for water, and therefore failed to prove § 85-2-311(1) (a), MCA.

[Permit granted in part.]

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<b>Final Order Date:</b>	02/21/89 (G W/C)	<b>Applicant:</b>	Montana DNRC
<b>Case #/Type:</b>	58294-41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	12/03/84	<b>Examiner:</b>	Scheier
<b>Hearing Date:</b>	01/27/88	<b>Use:</b>	Storage

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**E-22.480** Substantial credible evidence will convince reasonable persons, and they will not differ as to whether it establishes the prevailing party's case.

O-2.490 Objection based on cost apportionment of project held improper; dismissed.

O-2.490 Objections of parties are governed by agreements and stipulations among them.

U-14.120 The Water Use Act does not require that unappropriated water be available every year for a permit to issue, but only in some years. [FO]

U-14.1259 Simply because claimed water rights exceed the yield of the drainage does not mean that there is no unappropriated water in the drainage, because of such factors as return flows, timing, and patterns of use, there may be unappropriated water. [FO]

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<b>Final Order Date:</b>	03/13/89 (G W/C)	<b>Applicant:</b>	U.S. Fish and Wildlife Service
<b>Case #/Type:</b>	G190495-41A (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/14/88	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	10/18/88	<b>Use:</b>	Wildlife Habitat

A-4.9348 Where an appropriator reduces the consumptivity of his water use for  
A-4.9348.48 for a period of 30 years, then wishes to resume same consumptivity  
E-24.4810 as originally used, and there is no evidence of intent to abandon the consumptive portion of the original right, a return to original consumptivity does not constitute an increase in burden on the source.

A-4.9348.48 Where appropriation has been operated with reduced consumptivity for  
E-24.4810 less than 40 years, no presumption of intent to abandon former consumptivity arises.

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<b>Final Order Date:</b>	03/21/89 (D)	<b>Applicant:</b>	Twite
<b>Case #/Type:</b>	57517-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/24/85	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	03/13/86	<b>Use:</b>	Irrigation

A-4.930 Alleged that appropriation would reduce artesian pressure in objector's wells. Without deciding whether such reduction is adverse effect, held that any reduction which may occur would be **de minimus**; thus, there is no adverse effect regardless.

I-14.900 Because well had not yet been drilled, no information in record as  
U-14.1274 to whether water physically available at the proposed point of diversion. Held, applicant should be granted interim permit to drill well for testing purposes in order to be allowed to prove unappropriated water criterion, as all other criteria proved and no adverse effect to objectors likely.

[Applicant failed to drill well; proposal amended to deny.]

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<b>Final Order Date:</b>	03/22/89 (G W/C)	<b>Applicant:</b>	Ed Murphy Ranches
<b>Case #/Type:</b>	W19282-s41E (C)	<b>Regional Office:</b>	Helena
	W19284-s41E		
<b>Application Date:</b>	10/17/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	03/24/88	<b>Use:</b>	Diversion

A-4.9348.20 Where a point of diversion is moved from a tributary to a point on

A-4.9392 the main stem above the tributary confluence, the moved water right must be subordinated to other water rights with points of diversion on main stem above tributary confluence.

A-4.9348.20 Moving point of diversion upstream does not **ipso facto** constitute adverse effect, but depends on the facts of the case.

A-4.9373 Absent information which establishes that an irrigation water right has historically been utilized according to a certain pattern, the Department will presume that there is no historic pattern of use within the period of use claimed. (Modifying the rule stated in **Ryen**, G120401-41H, Interlocutory Order, p. 22.) Sustained in Final Order.

A-16.7567 When amendment of application results in reduction of the requested place of use, but does not change the legal description set forth in the public notice, amendment may be accepted at hearing.

M-5.110 Ditch adequacy means physical adequacy of the ditch, not whether applicant may legally use the ditch to conduct more water than he currently conducts (FO).

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Final Order Date:	04/11/89 (G)	Applicant:	City of Belgrade
Case #/Type:	24875-g41H (E)	Regional Office:	Bozeman
Application Date:	11/08/82	Examiner:	Scott
Hearing Date:	01/24/89	Use:	Diversion

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D.21.290 Grant of previous extension is **prima facie** evidence of reasonable diligence on part of the applicant prior to that extension.

J-21.800 Department does not have jurisdiction to reconsider issuance of original permit, or to modify same in an extension proceeding.

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Final Order Date:	04/11/89 (G W/C)	Applicant:	Ligon
Case #/Type:	P065887-s76K (P)	Regional Office:	Missoula
Application Date:	07/23/87	Examiner:	Reynolds
Hearing Date:	07/26/88	Use:	Reservoir

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A-16.7567 Where applicant only applied for the water that was going to be consumed and not for that which would be returned to the stream, permit could not be granted for return flow amount even if there will be insufficient water to adequately irrigate the full acreage.

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Final Order Date:	04/17/89 (G W/C)	Applicant:	Casagrande
Case #/Type:	64464-g43E (P)	Regional Office:	Billings
Application Date:	05/21/87	Examiner:	Kerbel
Hearing Date:	03/07/89	Use:	Irrigation
Oral Argument Date:	03/07/89		

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A-4.930 Evidence shows potential for drawdown of objector's wells over long term; however, applicant's stated intent is to divert for irrigation for only one or two years until ground cover is established. Held, no adverse effect.

A-4.9395

A-16.7567 Although applicant has stated that after ground cover is established by irrigation, he intends to use the water for a waterfowl pond, he did not apply for that use, and it cannot be granted at this juncture. He must make separate application.

A-16.7576 Department is not required to give individual notice to all



D-21.310 appropriators in area of source if records do not provide reason to  
J-21.800 believe the effects of the project will extend that far.

D-21.310 Prehearing meeting with field manager is purely discretionary.  
J-21.800 Parties not prejudiced by failure to hold meeting.

E-22.408 "Objections" to documents in Department file, based not on  
admissibility, but rather consisting of arguments on the issues,  
held not proper objections to evidence. [FO]

I-14.900 No test pumping has been done, and there is no evidence of the  
U-14.1274 productive capacity of the aquifer in the record. Therefore, § 85-2-  
311(1)(a), MCA, not met. However, because groundwater is such that  
an applicant can only satisfy his burden of proof by actually  
pumping, grant of an interim permit is proper.

J-21.800 Time periods specified in statute for Department action on  
application are directory rather than jurisdictional. Failure to act  
within them does not trigger a mandatory duty either to deny or  
grant a permit.

J-21.800 Application for permit cannot be denied for violation of statute  
S-21.660 precluding diversion of water without a permit.

S-21.660 Applicant provided enough evidence to avoid summary judgment at end  
of presentation of his case.

[Interim permit issued.]

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<b>Final Order Date:</b>	04/18/89 REVOKED	<b>Applicant:</b>	Loomis/Edenfield
<b>Case #/Type:</b>	28224-s41I (R)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/25/80	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	11/29/88	<b>Use:</b>	Mining
<b>Oral Argument Date:</b>	03/03/89		

A-4.9394 Permit not developed because of Department of Health's denial of  
J-21.800 direct discharge permit. However, DNRC cannot second-guess  
P-5.8021 original fact finder and do as applicant proposes, **i.e.**, simply  
eliminate direct piping of return flow condition so that permit can  
be developed.

P-5.8032 Department must revoke permit if permit conditions have not been  
R-5.930 met, even when noncompliance results from a conflict with  
regulations of another state agency, when the permit conditions have  
been determined to be necessary in order for the permit to meet the  
statutory criteria for issuance. However, if sufficient good cause  
is shown, the Department may grant the permittee the option of  
requesting a hearing with the original objectors in order to provide  
substantial credible evidence that the permit criteria may be met  
without the permit condition(s) which conflict with other state  
regulations.

R-5.390 Department recognizes that permittee is at an impasse caused by  
conflicting requirements of another state agency. Accordingly, the  
original permit may be revised pursuant to applicant's request to  
reconvene original permit hearing for receipt of further evidence  
(original objectors to be notified).

R-5.9379 At reconvened hearing, applicant may only present evidence which was  
not obtainable at the time of the original hearing.

[Permittee failed to request hearing; permit revoked.]

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<b>Final Order Date:</b>	04/27/89 (G W/C)	<b>Applicant:</b>	Fagan
<b>Case #/Type:</b>	G65713-76N (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/26/87	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	01/25/89	<b>Use:</b>	Domestic

  

**A-4.930**           Where spring is not hydrologically related to another spring, diversion from first spring cannot adversely affect appropriations from second spring.

**A-4.930**           Where appropriator already has right to divert water from a source, and it the very existence of this right which "adversely affects" objectors, a change in such right cannot be barred simply on the basis of this preexistent "adverse effect". Rather the review is limited to adverse effects which may be caused by the proposed change.

**A-16.750**           Exemption of domestic uses from record keeping requirements does not  
**E-22.480**           mean that the legislature intended that domestic uses be exempt from  
**E-24.480**           from 85-2-402.

**A-16.750**           Filing of statement of claim does not exempt applicant from  
**E-24.480**           necessity of obtaining change authorization prior to making change in right.

**B-5.6979**           Although a permit cannot be issued for more water than can be beneficially used (85-2-312(1), MCA) there is no comparable prohibition where an existing right is to be changed to a new use. However, even assuming that there is an implicit analogous prohibition re changes, the existence of other water rights utilized for the same use does not necessarily mean that applicant cannot beneficially use all of the water right he proposes to change.

**E-24.480**           Where there is evidence in the record indicating that applicant owns the water right to be changed, applicant has met its threshold requirement and the Department may act on the request, even if no final determination has been rendered by a court of competent jurisdiction.

**E-24.480**           Determination of ownership of water right properly in district  
**J-21.800**           court.

**E-24.4820**           Certification statute appears to preclude certification to the Water Court of issues of existence or extent of right exempted by statute from the adjudication process.

**E-24.4820**           Stipulation between parties to certify not binding on Department.  
**J-21.800**

**E-24.4831**           Failure to file a certificate of transfer with the Department does not invalidate the underlying water right or its conveyance.

**J-21.800**           An appropriator cannot be compelled to forgo the use of one water right simply because he has another right available for that use.

**M-5.110**           Means of diversion are adequate, even if pipeline to be used is subject to breaks, so long as applicant will operate same to prevent breaks.

**M-5.110**           Running small amount of water in pipe in winter to prevent freezing,

W-1.870 a usual and customary practice in the area, is probably not wasteful, and is adequate to prevent freezing.

M-5.1129 Existing easement not required to find means of diversion adequate.

P-18.720 Conditioning construction of pipeline to prevent property damage to objectors is improper as authorization cannot be denied on basis of adverse effect to property other than water rights.

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<b>Final Order Date:</b>	05/04/89 (D)	<b>Applicant:</b>	Dunks/McCauley
<b>Case #/Type:</b>	G41585-s41E (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/20/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	01/06/88	<b>Use:</b>	Diversion
<b>Oral Argument Date:</b>	10/12/88		

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A-4.9348.20 There are several tributaries which enter the source between the old point of diversion and the new point of diversion. Therefore, applicant, in moving his point of diversion downstream, would be able to use his senior priority date to obtain water which was previously unavailable to him upstream, **i.e.**, he could enlarge his appropriation at the expense of junior appropriators. Held, this is adverse effect to juniors.

A-4.9348.20 No workable plan for precluding **de facto** enlargement of right due to  
T-5.800 move of point of diversion was presented. Held, absent conditions, change authorization would adversely affect juniors.

A-4.9348.20 The Department is not requiring proof to an absolute certainty;  
B-21.780 however, because it is inherently difficult to prove no adverse effect resulting from moving a point of diversion 15 miles downstream when there are numerous intervening appropriators and tributaries, the burden in this case is heavy. [FO]

A-4.9348.48 In weighing adverse effect due to stream loss, examiner properly focused on the percentage stream loss at low flows (which was greater than at higher flows). [FO]

A-4.9379 Reduction of return flow does not necessarily constitute adverse effect; it is a question of fact. Held, here it would be adverse effect.

A-4.9379 Historically, 50% of diverted flow quickly returned to source. Held, as long as diversion of that 50% is prevented, there will be no adverse effect due to loss of return flow.

A-4.9348.20 Evidence shows that there is 15% stream loss between old point of  
A-4.9379 diversion and new point of diversion downstream. Held, of the 50% left to applicant, 15% must remain in the source at new point of diversion to make up for stream loss.

E-24.4820 Department has no duty to certify issue of abandonment to Water Court.

E-24.4820 The Department will only certify an SB #76 claim if the contested case cannot be argued without doing so.

E-24.4831 A stipulation between a claimant and the Department filed with the Water Court that the amount stated in the original SB #76 claim is excessive, and stating a new amount, is regarded as an amendment to the claim for purposes of quantifying a right in this proceeding.

**E-24.4831** In Department proceedings, an (amended) SB #76 claim is unassailable proof of its content. [Note: Interpretation that claim is unassailable, adopted in initial reaction to **United States v. Dept. of Natural Resources & Conservation**, Montana 1st Judicial District, June 15, 1987, effected reversal of previous Department holdings. It has since been modified.]

[Authorization denied.]

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<b>Final Order Date:</b>	05/08/89 (G W/C)	<b>Applicant:</b>	Keim/Krueger
<b>Case #/Type:</b>	G129039-76D (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/10/87	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/27/89	<b>Use:</b>	Diversion

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**A-4.930** Extra flow in ditch not adverse effect to objectors where it appears the additional water will provide extra head for their pipeline, and where ditch large enough to simultaneously accommodate applicant's senior right and objector's junior right in their entirety.

**A-4.930** No adverse effect to users on source where change in point of diversion will not change the flow of water available downstream.

**A-4.930** No adverse effect where evidence in the record shows that alleged adverse effects have already been ameliorated or can be by imposition of proper terms and conditions.

**A-4.9348.00** Where there is a dispute over ownership of a water right, an increase in burden on source due to dual use of the right by each claimant, after a change of place of use is made by applicant, can be eliminated by appropriate conditioning of the change authorization.

**A-4.9394** No evidence to suggest proposed use of water will impact water quality in source where diversion small, there is little return flow, and only a short time of contact with soil of similar pH and saline levels as creek.

**E-24.480**  
**J-21.800** The Department has no jurisdiction to decide a dispute between the parties as to how much water was transferred from objector to applicant as part of a property deal; however, it may determine from the evidence presented whether applicant has colorable title to the water, and proceed based on that, subjecting any change authorization to later defeasance.

**M-5.110** Ditch adequate where can be made large enough to carry extra water by cleaning and dirtwork.

**M-5.1129** Whether party presently has easement not relevant to determination of adequate means of diversion.

**S-20.110** Where late objectors, but for a department oversight, would have received individual notice, same may be granted status of parties.

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<b>Final Order Date:</b>	05/25/89 (G)	<b>Applicant:</b>	Oh's
<b>Case #/Type:</b>	P49605-s41G (E)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	09/20/88	<b>Examiner:</b>	Kerbel
<b>Hearing Date:</b>	02/17/89	<b>Use:</b>	Hydropower

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**P-5.8031** Actively pursuing licensing requirements from different agencies and seeking revenues to construct project is due diligence. [Extension granted.]

<b>Final Order Date:</b>	05/25/89 (G)	<b>Applicant:</b>	Ohs
<b>Case #/Type:</b>	53070-s41G (E)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	11/28/88	<b>Examiner:</b>	Kerbel
<b>Hearing Date:</b>	02/17/89	<b>Use:</b>	Hydropower

E-22.2480      The granting of a previous extension is **prima facie** evidence of due  
P-5.8031      diligence on the part of the applicant prior to that extension.

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<b>Final Order Date:</b>	06/09/89 (G)	<b>Applicant:</b>	First Madison Geo.
<b>Case #/Type:</b>	42665-g41F (E)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/22/88	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	None	<b>Use:</b>	Industrial

P-5.8031      Due diligence toward effecting a permitted appropriation with  
changed purpose of use is good cause for granting extension of time,  
even if formal approval of such change has not been given, providing  
application for such change has been filed and approval is  
ultimately received.

S-21.660      Where no issue of fact has been raised in an objection, dismissal of  
objection is not proper where **bona fide** legal issue raised. Rather,  
a proposal for summary determination should issue.

[Extension granted.]

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<b>Final Order Date:</b>	06/16/89 (G W/C)	<b>Applicant:</b>	Johnson, Sadie
<b>Case #/Type:</b>	65175-g76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/13/87	<b>Examiner:</b>	Cross
<b>Hearing Date:</b>	06/15/88	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	03/03/89		

M-5.110      Uncertainties created by a Superfund designation do not make the  
applicant's means of diversion inadequate.

U-14.1259      Water may be unappropriated even if a senior user has claim to it,  
if there is evidence that the senior right holder does not use the  
water at all times.

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<b>Final Order Date:</b>	06/30/89 (D)	<b>Applicant:</b>	Sheridan County/ City of Plentywood
<b>Case #/Type:</b>	57448-s40R (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	03/12/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	09/24/86	<b>Use:</b>	Recreation

A-16.750      Where applicant fails to state when water will first be approp-  
A-16.7516      riated, either expressly or by implication, and statements made in  
the application actually equivocate as to whether water will be used  
at all, the application is deficient under § 85-2-310(4), MCA, and  
may be returned.

A-16.750      Proper filing of the application with documentation, as required  
A-16.7516      under § 85-2-310(4), MCA, is **prima facie** evidence of the existence  
of **bona fide** intent at the time of filing.

A-16.750      In order to obtain the priority date of the date of filing,  
A-16.7516      applicant must have **bona fide** intent as of that date.

E-24.4848      The Fort Peck - Montana Compact imposes no moratorium on new approp-  
S-20.110      riations; however, the Tribe does have standing to object on other

grounds.

**J-21.800** Department has no jurisdiction to deny permit based on adverse  
**P-18.720** effect to property rights which are not water rights.

**S-20.720** Where volume shown physically available is 605 acre-feet,  
**U-14.1274** evaporation is 327 acre-feet, and seepage loss is unknown,  
**W-1.870** § 85-2-311(1)(a), MCA, is not met for nonconsumptive recreational  
use, for it cannot be determined if the reservoir will ever even  
fill.

**T-5.800** To impose conditions on a permit based on a stipulation between the  
parties, said conditions must be relevant and necessary to  
fulfillment of criteria listed in 85-2-311.

**U-14.1274** Where volume shown physically available is insufficient to supply  
requested consumptive uses, § 85-2-311(1)(a), MCA, is not met for  
such uses.

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<b>Final Order Date:</b>	07/27/89 G)	<b>Applicant:</b>	Christley
<b>Case #/Type:</b>	G(W)110476-76H(E)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/23/87	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/08/89	<b>Use:</b>	Irrigation

**P-5.8031** Due diligence requirement as set forth in Application (Permit) 39787  
by **Rehbein** is not binding for extension requests for change  
application; good cause is the only requirement.

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<b>Final Order Date:</b>	08/24/89 (G W/C)	<b>Applicant:</b>	Cannon
<b>Case #/Type:</b>	67646-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/25/88	<b>Examiner:</b>	Compton
<b>Hearing Date:</b>	02/28/89	<b>Use:</b>	Domestic

**A-4.930** Possible adverse effects to appropriators on the "main" stream  
source must be addressed if raised by objectors, even where the  
proposed appropriation is from a tributary stream.

**W-1.870** Waste of water due to alleged unreasonable means of diversion by  
senior right holders must be proven by applicant.

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<b>Final Order Date:</b>	09/15/89 (G)	<b>Applicant:</b>	Watt
<b>Case #/Type:</b>	52803-41I (E)	<b>Regional Office:</b>	Helena
	54549-41I (E)		
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	05/10/89	<b>Use:</b>	Irrigation

**D-21.290** Applicant failed to demonstrate due diligence; however, closure of  
area by governor and applicant's extended illness are good cause to  
grant an extension so long as these are not part of a continuing  
pattern of similar excuses.

**P-5.8031** Although not due diligence, illness may be good cause to grant  
extension, providing it is not part of a continuing pattern of  
similar requests for extension.

[Extension granted.]

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<b>Final Order Date:</b>	09/15/89 (G)	<b>Applicant:</b>	Golden Star Mining
<b>Case #/Type:</b>	59179-s41D (E)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	11/07/88	<b>Examiner:</b>	Compton
<b>Hearing Date:</b>	05/19/89	<b>Use:</b>	Mining

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P-5.8031 Due diligence can be exercised by party other than applicant.

U-19.300 Use of water for testing purposes can be construed as demonstrating diligence toward completion of permitted project.

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<b>Final Order Date:</b>	09/15/89 (G W/C)	<b>Applicant:</b>	Burns
<b>Case #/Type:</b>	67217-43B (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	04/13/88	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/28/89	<b>Use:</b>	Irrigation

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A-4.930 Where "tributary" disappears into a fault, and district court has held "tributary" did not contribute to decreed stream, there can be no adverse effect to users on decreed stream from appropriation of tributary.

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<b>Final Order Date:</b>	09/19/89 (D)	<b>Applicant:</b>	Knutson
<b>Case #/Type:</b>	G155812-43A (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	08/17/82	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	8/29/88	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	06/19/89		

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A-4.930 Nonspecific testimony that extra water needed will be water salvaged  
A-4.9348 through "better management" is insufficient to prove there will be no increase in source depletion, and hence is insufficient to prove no adverse effect to other appropriators.

A-4.930 Where applicant has applied to double his acreage under a given  
A-4.9348.10 water right, even if he will not increase his flow rate, there is a  
A-4.9379 high potential for increased length of diversion and/or reduction of historic return flows, and thereby increased diverted volume.

B-21.780 Section 85-2-402, MCA (1985), setting forth expanded criteria which applicant must prove are met, applies retroactively to any application pending with the Department on July 1, 1985.

B-21.780 Burden of proof in a change proceeding has been on applicant since 1973, notwithstanding the fact that it was not specifically set forth in § 85-2-402 prior to 1985. [Discussed.]

W-1.870 Appropriators of waste water have no vested right to its continued generation.

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<b>Final Order Date:</b>	10/10/89 MODIFIED	<b>Applicant:</b>	Marks
<b>Case #/Type:</b>	6673-C41I (R)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Griffing
<b>Hearing Date:</b>	08/22/89	<b>Use:</b>	Irrigation

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L-1.940 Statute and **Montana Power Co. v. Carey** allow Department to impose  
P-5.8021 completion date and conditions on change authorization.

P-5.8021 Certainly since revision of § 85-2-312(3), MCA, in 1987, Department  
P-5.8031 cannot grant appropriator extension of time to complete authorized change in revocation/modification proceedings.

[Appropriator made only some of the changes authorized;  
authorization modified.]

<b>Final Order Date:</b>	10/13/89 (G W/C)	<b>Applicant:</b>	Meadow Creek Golf Course
<b>Case #/Type:</b>	G128984-s76D (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/25/88	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/16/89	<b>Use:</b>	Recreational
<b>A-4.9348.20</b> <b>A-4.9392</b>	Where a point of diversion is moved from a tributary to a point on the main stem above the tributary confluence, the moved water right must be subordinated to other water rights with points of diversion on main stem above tributary confluence. Applicant may only divert as much water at the new point of diversion as is simultaneously available at the old point of diversion.		
<b>E-22.480</b> <b>E-24.4810</b>	Section 85-2-404(4), MCA, specifically exempts claims that have not been adjudicated from subsections (1) and (2) which presume abandonment after 10 years of nonuse.		
<b>Final Order Date:</b>	10/18/89 (G W/C)	<b>Applicant:</b>	Brookside Estates
<b>Case #/Type:</b>	G55348-76M (C) G99591-76M (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/28/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	01/20/89	<b>Use:</b>	Irrigation/ Recreation
<b>A-4.9392</b> <b>A-4.9394</b> <b>B-21.780</b>	Where objector makes a plausible case that its domestic water right could be adversely affected by degradation of water quality due to proposed use, and applicant meets this evidence with a plan to preclude such adverse effect, permit may be conditioned to ensure that the plan is followed.		
<b>B-5.6910</b>	Aesthetic use is a beneficial use of water. [Discussed.]		
<b>J-21.800</b>	Examiner does not have jurisdiction in hearing on permit application to determine if the prior issuance of different permit was proper.  [Permit granted subject to conditions. Certain measurement requirements which had not been proposed were adopted pursuant to assertions in objector's exception.]		
<b>Final Order Date:</b>	10/18/89 (D)	<b>Applicant:</b>	Fee/Carlson
<b>Case #/Type:</b>	68695-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/18/88	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	06/06/89	<b>Use:</b>	Mining
<b>A-4.9325</b> <b>U-14.1259</b>	Where applicant wishes to recirculate diverted water to provide enough for mine during low water periods, applicant must prove that source disruption caused by delayed return will not result in an unreasonable number of legitimate calls every year during low water periods.		
<b>U-14.1259</b>	Testimony that water disappears under creek bed downstream of proposed point of diversion does not of itself show that water cannot be legitimately called for, as water may resurface downstream; therefore, it is not proof that water is legally available.		



<b>Final Order Date:</b>	10/18/89 (D)	<b>Applicant:</b>	Wright Ranch, Inc.
<b>Case #/Type:</b>	G192529-40A (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/14/88	<b>Examiner:</b>	Rolf
<b>Hearing Date:</b>	07/06/89	<b>Use:</b>	Irrigation

**A-4.9348.20** When evidence shows there is more water at new point of diversion than at old point of diversion, but there is no evidence to show how applicant would limit the diversion at the new point of diversion to that available at old point of diversion, junior appropriators could be adversely affected, and authorization must be denied.

<b>Final Order Date:</b>	10/19/89 (G W/C)	<b>Applicant:</b>	Worf
<b>Case #/Type:</b>	G111165-01-76H(C) G151753-01-76H(C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/26/88	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	04/28/89	<b>Use:</b>	Irrigation

**A-4.9348.10** Return flow equivalents, *i.e.*, water once returned to source but left therein after conversion from flood to sprinkler irrigation; may not be diverted to provide water for expanding acreage.

**A-4.9348.10** Expansion of acreage allowed, even though salvage not quantified where acreage is expanded by same percentage as salvage, *i.e.*, where 25% of water diversion was once lost, but is now salvaged and only 50% of water diversion originally reached fields, acreage may be expanded by 50%.

**A-4.9348.48**  
**B-21.780** Objectors bear burden of production re existence of subsurface return flows.

**A-4.9392** Flow meter must be placed before openings in pipeline to ensure proper measurement and administration of the rights.

<b>Final Order Date:</b>	11/06/89 (G)	<b>Applicant:</b>	Vaira
<b>Case #/Type:</b>	G025010-s40P (E)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Larson
<b>Hearing Date:</b>	07/11/89	<b>Use:</b>	Irrigation

**P-5.8031** Soil analysis was performed, plans and specifications drawn up, a firm commitment from FmHA to finance the project has been obtained. A change in the project was authorized in 1985; however, drought conditions over the past eight years, and loss of the plans a year and a half ago hampered the project. Held, good cause exists to grant extension. [Extension granted.]

<b>Final Order Date:</b>	11/06/89 (G W/C)	<b>Applicant:</b>	Silver Eagle Mining
<b>Case #/Type:</b>	69141-76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/15/88	<b>Examiner:</b>	Griffing
<b>Hearing Date:</b>	09/07/89	<b>Use:</b>	Mining

**A-4.9394**  
**E-14.930** Because objector did not attempt to show otherwise, precautions taken to prevent contamination of source considered adequate for purposes of showing lack of adverse effect to objector.

**M-5.110** Collection of snowmelt and rain in lined ponds considered adequate means of diversion.

<b>Final Order Date:</b>	11/15/89 (D)	<b>Applicant:</b>	Royston
<b>Case #/Type:</b>	101960-41S (C)	<b>Regional Office:</b>	Lewistown
	101967-41S (C)		
<b>Application Date:</b>	06/22/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	09/30/88	<b>Use:</b>	Irrigation

**A-4.930** Burden on source may not increase if it would adversely affect other  
**A-4.9348** source users.

**A-4.9348** The burden on the source, the depletion of the source due to the  
**A-4.9348.48** exercise of a water right, is calculated both in terms of total  
annual depletion (volume), and maximum instantaneous depletion  
(flow). "Maximum instantaneous depletion" is the rate of diversion  
minus the rate of return flow; "total annual depletion" is the total  
volume diverted in a dry year minus total volume returned.

**A-4.9379** Where irrigation occurs adjacent to the source, return flow both on  
**B-21.7875** the surface and subsurface, may be inferred.

**M-5.110** Where irrigation system is designed for flow rates of 750 gpm, and  
maximum usage allowed during nonhigh water periods, is 144-247 gpm,  
and the evidence does not show that the system can be operated at  
the lower flow rates, it cannot be concluded that the means of  
diversion and operation are adequate.

**APPEALED TO DISTRICT COURT. DEPARTMENT DECISION UPHELD.**  
**APPEALED TO MONTANA SUPREME COURT. DECISION UPHELD.**

<b>Final Order Date:</b>	12/18/89 (G W/C)	<b>Applicant:</b>	Tietz
<b>Case #/Type:</b>	150741-41H (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/01/85	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	10/20/88	<b>Use:</b>	Irrigation

**A-4.9348.20** If proposal is to change point of diversion only, then how much  
water is used on land is irrelevant in determining adverse effect or  
beneficial use as these will not be changed. Amount used is relevant  
only to adequacy of new diversion works.

**E-24.4831** Whether claim of existing right reflects beneficial use  
of entire amount claimed not an issue in this proceeding. [FO]

**E-24.4831** Volume of water appurtenant to a subdivided portion of the original  
tract is the volume historically necessary to irrigate that portion.

**J-21.800** Examiner's conclusion that "it is possible that in future Dusenberry  
**M-5.1129** and/or other parties may legitimately conduct more water through  
ditch" does not mean that the Department has made any determination  
whatsoever regarding applicant's legal right to use the ditch. [FO]

**R-5.930** None of examiner's findings are clearly erroneous; therefore none  
were overturned. [FO]

<b>Final Order Date:</b>	01/05/90 (G W/C)	<b>Applicant:</b>	Shervin
<b>Case #/Type:</b>	22047-g41E (E)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Kerbel
<b>Hearing Date:</b>	06/21/89	<b>Use:</b>	Irrigation

(See also 22047-41E (P) under Kyler.)

A-16.7516  
P-5.8031      Section 85-2-310(4)(c)(iii), MCA (1987) requiring a detailed project plan with time line to demonstrate **bona fide** intent does not apply in extension proceeding, as the permit was issued before statute effective date, as the permit is not of sufficient size to trigger statute, and as this is an extension request on a permit already issued.

E-22.480  
P-5.8031      Most of the work on the project which had been done by the time of the hearing was done during the period of the temporary extension. Held, such work may be considered in determining applicant's due diligence.

E-22.480  
P-5.8031      Evidence of work done on project after completion deadline but during temporary extension of Department jurisdiction for purposes of determination of whether extension should be granted, admissible.

E-22.480  
P-5.8031      Grant of previous extension is **prima facie** evidence of due diligence prior to that extension.

E-24.4810  
P-5.8021      Permit which has not been perfected is not a water right and cannot be "abandoned". Accordingly, § 85-2-404, MCA, establishing **prima facie** presumption of abandonment after ten years nonuse of appropriation right does not apply. Failure to perfect may, however, result in revocation of the permit.

P-5.8031      Reasonable diligence is the steady good faith effort toward perfecting a permit.

P-5.8031      Due diligence in pursuing completion of one project, which is independent of a second project for which a different permit has been issued and for which extension is requested, held not good cause to extend second permit.

P-5.8031      Although extended search for a "good deal" on equipment is not due diligence, obtaining actual bids for specific irrigation systems to determine whether or not permittee can afford the project is not shopping for a good deal.

[Proposal to grant extension.]

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<b>Final Order Date:</b>	01/08/90 (IR-D)	<b>Applicant:</b>	Worth
	(ST-G W/C)		
<b>Case #/Type:</b>	65689-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/16/87	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	08/08/89	<b>Use:</b>	Stock/Irrigation

A-4.930      Objector with no water right cannot be adversely affected.

A-16.7516      Applicant was "unsure" of the proposed irrigation use. Testified at the hearing of not being quite sure what he would do. Held no bona fide intent.

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<b>Final Order Date:</b>	01/10/90 (D)	<b>Applicant:</b>	DeBrestian
<b>Case #/Type:</b>	70272-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/22/88	<b>Examiner:</b>	Compton
<b>Hearing Date:</b>	10/17/89	<b>Use:</b>	Irrigation

E-22.480      Amended claims are **prima facie** evidence of their content.  
E-24.4831

**U-14.1259** Objector claims all water in ditch it uses for irrigation. Applicant asserts that the ditch also "drains" water from old road bed, **i.e.**, that it gains water which is unappropriated as objector not entitled to gain. Applicant failed to prove gain. Therefore, held unappropriated water not shown to exist (as all other water in ditch appropriated by objector).

**DENIED.**

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<b>Final Order Date:</b>	01/23/90 (G W/C)	<b>Applicant:</b>	Greathouse
<b>Case #/Type:</b>	65739-76H (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/19/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	07/14/89	<b>Use:</b>	Irrigation

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**P-18.720** Property damage, other than water rights, not a basis for denial of permit.

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<b>Final Order Date:</b>	02/02/90 (G W/C)	<b>Applicant:</b>	Otness
<b>Notice of Remand:</b>	11/07/89		
<b>Case #/Type:</b>	54693-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/17/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	04/14/88	<b>Use:</b>	Irrigation
<b>Oral Argument Date:</b>	05/16/89		

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**A-4.930** Surface appropriators from McCormick Coulee cannot be adversely affected by appropriation of subsurface water developed and added to the surface source by applicant as they never had the use of such water.

**E-24.480** A water right can be established in waste water, but the waste  
**S-15.920** appropriator cannot compel the continued generation of the waste  
**W-1.870** unless its deprivation is malicious or arbitrary.

**E-24.480** As it is in the interest of the county to have the highway drained  
**U-14.1259.00** by tiles, rather than by maintaining drain ditch, it cannot be said  
**W-1.870** that the cessation of generation of water in the county ditch is malicious or arbitrary. Therefore, waste appropriator cannot compel continuance of waste.

**E-24.4831** Even assuming applicant's estimate of McCormick Coulee flow was  
**U-14.1259** correct, claims of existing right already on source exceed amount of Coulee water. Because applicant did not show that the claims were exaggerated or not used to the full extent, he failed to prove any of the natural flow of the Coulee was unappropriated.

**E-24.4831** Where drain ditch installed by county to drain under highway, and  
**W-1.870** water is removed from that drain ditch by private appropriator for irrigation, that appropriator has made a waste appropriation, and he cannot compel the county to continue generation of the waste.

**J-21.800** The Department has no jurisdiction regarding the existence of a tile drain system; it can neither sanction its use, nor compel its removal. However, it can deny issuance of a permit to use that water if the diversion does not comply with the requirements of § 85-2-311, MCA.

[Proposal held that applicant was only applying to appropriate developed water, and would have granted only such surface water as applicant proved was developed by him. Upon oral argument, it was determined that applicant had actually applied for any

unappropriated water in the Coulee, developed or undeveloped. Case remanded for determination of whether applicant proved that any of the nondeveloped water in Coulee was unappropriated. Upon remand, examiner determined that applicant had failed to prove at the initial hearing that any unappropriated water existed in McCormick Coulee other than water applicant had developed.]

<b>Final Order Date:</b>	02/05/90 (G W/C)	<b>Applicant:</b>	Allred
<b>Case #/Type:</b>	15928-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/20/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	11/30/88	<b>Use:</b>	Irrigation

**A-4.9348.20**      Where a single appropriation is subdivided by subdivision of the  
**E-24.4831**      land to which it is appurtenant, and where no express division of  
the water is made, the subdividees take the carriage water portion  
of the right as tenants in common and a co-tenant may not change the  
point of diversion of his share of the carriage water without the  
consent of the other co-tenants (if removed of a share of the  
carriage water, would adversely affect another co-tenant.)

**A-4.9379**      Where irrigation does not occur immediately adjacent to the source,  
**B-21.780**      and where objector on source alleges reliance on subsurface return  
**E-24.4831**      flow from such irrigation, in order to place a burden of proof  
**W-1.870**      regarding that issue on applicant, objector must produce some  
evidence tending to show that seepage from such irrigation returns  
to the source.

**E-24.4831**      An objector's right to groundwater does not include the right to a  
**W-1.870**      continuous of aquifer augmentation by seepage from irrigation which  
was accomplished using water from a source other than groundwater.

**B-21.780**      Objector has burden of producing facts sufficient to raise  
allegation of adverse effect to a level of plausibility.

<b>Final Order Date:</b>	05/07/90 (G)	<b>Applicant:</b>	Starner
<b>Case #/Type:</b>	64988-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/15/86	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	09/08/89	<b>Use:</b>	Irrigation

**J-21.800**      State has jurisdiction to grant permits to appropriate excess water  
on Flathead Reservation. [Memo]

<b>Final Order Date:</b>	05/07/90 (P4D DATE)	<b>Applicant:</b>	Ciotti
<b>Case #/Type:</b>	66459-76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/04/87	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>	05/19/89	<b>Use:</b>	Domestic

**A-4.930**      Objector not specific about how the appropriation would "impair"  
**B-21.780**      instream fishery flows on project irrigation rights. Held, did not  
meet burden of production.

**E-24.4848**      Assuming arguendo that instream fishery flows are "reserved" within  
**R-5.850**      meaning of § 85-2-311(1)(e), MCA, because applicant can be called to  
cease appropriating, there will be no unreasonable interference with  
fishery reservations.

**J-21.800**      State has jurisdiction to grant permits to appropriate excess waters  
on Flathead Reservation. [Memo]

**U-14.120**      [Cites Hadley test.]

U-14.120 Water physically available, diversion can occur in most years throughout period of appropriation without call. Held, unappropriated water exists.

**Application withdrawn 12/14/92.**

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<b>Final Order Date:</b>	05/07/90 (P4D Date)	<b>Applicant:</b>	Richardson (Formerly Flemings)
<b>Case #/Type:</b>	63574-s76L (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/19/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	09/22/88	<b>Use:</b>	Irrigation/Stock

A-4.9325 Objectors allege water from Kitty Girl Creek "eventually reaches  
A-4.9383 Finley Creek, but provided no information which shows that water  
B-21.780 does go subsurface, or data to establish a hydrologic connection.  
Regardless, there is no evidence that Finley Creek appropriator  
would be adversely affected, as 50% of irrigation return goes  
subsurface and would get to Finley anyway. Held, effect on Finley  
objector **de minimus**, if any.

A-16.7516 No present intent to use stock water; therefore, requested stock  
water cannot be granted.

B-5.6979 Requested volume excessive.

J-21.800 State has jurisdiction to grant permit to appropriate excess waters  
on Flathead Reservation. [Memo.]

T-5.800 Permit conditioned so applied for irrigation flow rate and volume  
cannot be exceeded.

U-14.1259.00 Applicant can utilize the requested amount of water throughout  
period of appropriation without being called, because senior user's  
calls downstream would be futile since released water would not  
reach them regardless.

U-14.1274 Requested flow available throughout period in most years.

**Application withdrawn 01/25/93.**

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<b>Final Order Date:</b>	05/11/90 (G W/C)	<b>Applicant:</b>	Red Lodge Country Club Estates
<b>Case #/Type:</b>	62454-g43D (P) 62455-g43D	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	07/25/86	<b>Examiner:</b>	Rolf
<b>Hearing Date:</b>	08/15/88	<b>Use:</b>	Recreational

**62454**

A-4.930 Where evidence in record that operation of well could drawdown  
B-21.780 aquifer and may reduce the flow of springs from which prior  
appropriations have been made, and applicant has not shown that this  
drawdown would not adversely affect these appropriations, applicant  
has failed to prove there will be no adverse effect.

A-4.9348.20 There is adverse effect where well would induce seepage from ditches  
and ponds utilized by other appropriators.

**62455**

**A-4.930** Where evidence in record shows possibility of well inducing seepage  
**W-1.870** from pond which is fed by ditches which convey surface water pursuant to another of applicant's rights, and applicant could simply divert more surface water pursuant to this senior right to replenish the pond, there is sufficient evidence of possible adverse effect to the water rights of junior surface appropriators in the record to require proof that such scenario will not occur.

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<b>Final Order Date:</b>	06/01/90 (G W/C)	<b>Applicant:</b>	Hildreth
<b>Case #/Type:</b>	71133-g41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	04/04/89	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	08/29/89	<b>Use:</b>	Domestic

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**A-4.9394** Environmental Protection Act standards for water quality adopted; held no adverse effect as maximum predicted nitrate concentration due to septic tank discharge is less than EPA standard.

**A-4.9395** Facts show no adverse effect due to well interference.

**A-4.9395** Evidence shows proposed appropriation could reduce water level in slough from which objector diverts. Held, this not adverse effect because the slough is the functional equivalent of a well penetrating only the very top of an aquifer which may well reasonably have to be deepened. In other words, the slough is the **de facto** means of diversion from the aquifer and it is not a protectable means of diversion.

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<b>Final Order Date:</b>	06/27/90 (D)	<b>Applicant:</b>	Keim/Krueger
<b>Case #/Type:</b>	67324-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/10/87	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/27/89	<b>Use:</b>	Fish Pond

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[See also related holdings in G129039]

**S-21.760** Irrigation right cannot to be used to supplement fish pond absent change authorization.

**U-14.1274** Where applicants have agreed to permit conditions which require that their diversion be shut off during low flow events, and there is no evidence that sufficient water to maintain adequate fish environment is otherwise physically available, 85-2-311(1)(a) is not met.

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<b>Final Order Date:</b>	07/10/90 (G)	<b>Applicant:</b>	Gunderson
<b>Case #/Type:</b>	P62352-43BJ (E)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	12/01/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/31/90	<b>Use:</b>	Flow through fish pond

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**P-5.800** Applicant purchased property after the Permit had been issued for a year and a half with little progress toward project completion.

**P-5.8031** Illness is good cause to grant an extension of time to complete project. Shortly after purchase, Applicant became ill and required several surgeries. Since Applicant planned to oversee the excavation and do the rest of the work himself, he could not reasonably be expected to complete project during his illness.

Some preliminary progress had been made; meeting with parties essential to the success of the project and contacting contractors for estimates on the excavation work.

Extension granted.

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<b>Final Order Date:</b>	07/11/90 (G)	<b>Applicant:</b>	Rasmussen
<b>Case #/Type:</b>	62946-s76LJ (E)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	11/08/89	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	05/31/90	<b>Use:</b>	Fish and Wildlife, Stock

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O-2.490  
S-20.110      Department and Examiner have discretion to determine whether objections are valid. Objections not addressing criteria at issue [§85-2-312 (3)], i.e., assertions that permit should not have been issued and that permittee intends to exceed limitations of permit, found to be invalid.

P-5.8031      Natural phenomenon, i.e., glacial erratics and frigid weather, are reasonable justification for delay and therefore good cause for extension in light of diligent efforts towards completion.

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<b>Final Order Date:</b>	07/24/90 (D)	<b>Applicant:</b>	Lockie
<b>Case #/Type:</b>	13539-01-s42KJ (E)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	11/14/89	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	05/17/90	<b>Use:</b>	Irrigation

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P-5.8031      Granting of a previous extension is **prima facie** evidence of reasonable diligence on the part of the Applicant. **Cites Belgrade.**

P-5.8031      Placing proposed place of use into a set-aside program, e.g., CRP, is not good cause for extension if doing so was a voluntary action, that is, alternative actions, if chosen, would not have excluded further efforts toward completion of the proposed project.

A-16.7516  
P-5.8031      Placing proposed place of use into CRP and requesting an extension of time to complete appropriation borders on a request for future use. Granting such an extension would bifurcate the permit into two appropriations under one priority date. This cannot be allowed because all waters, unless appropriated, are subject to appropriation by others.

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<b>Final Order Date:</b>	07/26/90 (G)	<b>Applicant:</b>	Pospisil
<b>Case #/Type:</b>	53426-41S (E) G10442-41S (E)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	01/11/90	<b>Use:</b>	Irrigation

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P-5.8031      Objector did not appear at hearing. Objection dismissed. Applicant had the land prepared and dam repaired. The project would have been completed except the dam washed out again. Applicant showed diligence toward completion. Extension granted.

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<b>Final Order Date:</b>	07/26/90 (G W/C)	<b>Applicant:</b>	Stewart
<b>Case #/Type:</b>	71967-41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/27/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/15/90	<b>Use:</b>	Irrigation

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A-4.9383      Even though there is a connection between the groundwater and surface water, Applicant provided substantial credible evidence of no adverse effect.



<b>Final Order Date:</b>	08/28/90 (G)	<b>Applicant:</b>	Regional Enterprises
<b>Case #/Type:</b>	36362-g76LJ (E)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	04/27/83	<b>Examiner:</b>	Reynolds
<b>Hearing Date:</b>	06/19/89	<b>Use:</b>	Domestic/Commercial

P-5.8031      Where construction of the project has not commenced in four years, and permittee states he is waiting for financial conditions to improve, no due diligence.

J-21.800      Department failed to notify an objector of the hearing date. Hearing held as scheduled and extension denied. Applicant filed exceptions to proposed order and requested oral argument. Application remanded to hearing unit for rehearing.

Objector was notified of the second hearing but did not appear. The second Examiner found due diligence and granted the extension of time.

P-5.8031      Even though no work had been done on the ground, Applicant had made considerable progress by obtaining bids from drillers, submitting plans to Department of Health and receiving approval of said plans, performing market studies and obtaining a developer.

<b>Final Order Date:</b>	09/11/90 (G W/C)	<b>Applicant:</b>	Wiediger
<b>Case #/Type:</b>	P068427-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/29/88	<b>Examiner:</b>	Cross
<b>Hearing Date:</b>	04/11/89	<b>Use:</b>	Fish/Stock

A-4.9383      Evidence shows diversion by applicant of seepage from ditch will not induce additional seepage. Thus, no adverse effect.

E-22.480      Testimony of expert that additional seepage would occur outweighed by first-hand testimony to the contrary.

E-24.4894      Seepage from ditch beyond control of initial appropriator. Therefore it is waste and subject to appropriation by another.

U-14.1259.00

W-1.870

M-5.110      Applicant failed to prove means of diversion adequate for use as fishery.

<b>Final Order Date:</b>	09/17/90 (G W/C)	<b>Applicant:</b>	Petersen Livestock
<b>Case #/Type:</b>	70584-g41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	12/14/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	11/15/89	<b>Use:</b>	Irrigation

A-4.9348.00      Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. The laws providing a mechanism for pursuing issue of cumulative effects are §§ 85-2-319, or 85-2 506 and 507, MCA.

A-4.9383

A-4.9392

B-21.780

L-1.940

A-4.930      Objector provided no evidence that incipient or hastened depletion of the ground water source will occur. Applicant has no burden to disprove adverse effects from future projects, or to disprove speculative allegations. **See** Meadow Lake, 55749-g76LJ, and Allred, G15928-76H.

B-21.780

**E-24.4820** If Applicant does not elect to execute a temp. water service  
**J-21.800** contract with BuRec and no adjudicative determinations are required,  
then Agreement between MPC, BuRec & DNRC does not preclude DNRC from  
issuing permit.

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<b>Final Order Date:</b>	10/02/90 (G W/C)	<b>Applicant:</b>	Thompson Falls, Town of
<b>Case #/Type:</b>	G024078-76N (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/20/89	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	N/A	<b>Use:</b>	Municipal

(Settled by Stipulation)

**T-5.800** Change authorization made subject to conditions of a 1981 written  
agreement between permittee and objector. Agreement had already been  
part of permit.

**E-24.4879** Change authorization subject to condition that Permittee shall  
**M-5.110** provide a bypass through diversion dam to remain open at least two  
**T-5.800** turns of the valve to accommodate year-round use by objector for  
domestic, stock, and subsurface recharge. Based on prior (1981)  
written agreement between parties.

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<b>Final Order Date:</b>	10/09/90 (G W/C)	<b>Applicant:</b>	Shining Mountains Owners Assoc.
<b>Case #/Type:</b>	G(W)31227-01-41F(C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	04/06/89	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	03/30/90	<b>Use:</b>	Irrigation

**B-21.78** Applicant's initial burden of production in a change hearing is  
discharged by providing an Application, Statement of Claim for the  
underlying water right, and the testimony of witnesses. Objectors  
then have burden of producing information by offering plausible  
argument that proposed change will adversely affect their water  
rights. Objectors failed to meet that burden.

**J-21.80** Effect on property rights not relevant.

**[GRANTED]**

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<b>Final Order Date:</b>	10/10/90 (G W/C)	<b>Applicant:</b>	Crisafulli
<b>Case #/Type:</b>	63997-g42M (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	01/30/87	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	07/24/90	<b>Use:</b>	Irrigation

**A-4.930** Objectors provided many events as implications of adverse effect,  
**A-4.9394** but no evidence to substantiate a causal relationship between the  
**B-21.780** events and applicant's activities under the Interim Permit. For  
**E-22.48** instance, the evidence of adverse effect on water quality was one  
objector's unsupported allegation of an impending algae bloom.

**A-4.9392** Upon applicant's discharge of burden to produce substantial credible  
**B-21.780** evidence on the issue of adverse effect, objectors must go forward  
by producing certain information stating, with particularity, how  
they anticipate the proposed use will change conditions of water  
occurrence or how it will affect their rights, and allege why they  
will not be able to reasonably exercise their right under the  
changed conditions. **See Houston: 60117-g76L.**

**A-4.9392** Lack of evidence of effort on the part of objectors to exercise  
**B-21.780** their seniority by activating a known mechanism for revoking or  
**E-22.480** modifying applicant's Interim Permit raises doubts about alleged  
adverse effects.

**A-16.7567** Amendment of means of diversion from three manifold wells to a  
**M-5.110** single well and downward amendment of flow rate and volume are  
acceptable without notification of persons not parties to the  
proceedings.

**A-4.9383** Since there is a relationship between surface flows and the ground  
**T-5.800** water source proposed for appropriation, and since diversion by  
applicant's well appears to influence surface flows, the ranking of  
the proposed appropriation in priority must be as against all rights  
to surface water as well as against all groundwater rights in the  
drainage. Permit conditioned to reflect this.

**B-21.780** Test for availability of unappropriated water consists of proving  
**U-14.1259.00** the physical presence of water at the intended point of diversion in  
**U-14.1274** the amount applied for at the times it is proposed to be put to use.  
(Based on 1989 amendment of 85-2-311(1)(a) as discussed in  
Department policy memorandum titled "Summary Report: Clark Fork  
Basin Water Use" dated 4/24/90.)

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<b>Final Order Date:</b>	10/12/90 (G W/C)	<b>Applicant:</b>	Winter Sports, Inc.
<b>Case #/Type:</b>	70511-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/27/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/18/90	<b>Use:</b>	Commercial

**A-4.9321** Objectors failed to meet their burden of producing evidence that,  
**A-4.9348.00** contrary to applicant's evidence, shortages of water had occurred  
**B-21.780** with a high degree of frequency, and that objectors were required to  
exercise their water rights by calling for water.

**A-4.9348.00** Because it would be impossible to perceive the change in stream flow  
**I-14.900** at an objector's point of diversion attributable to starting and  
stopping of applicant's diversion, operating the proposed system  
under an interim permit would not provide a valid test for  
availability of unappropriated water or for adverse effect.

**A-16.7567** Amendments to reduce place of use, expand the period of use from  
**M-5.110** storage, change means of diversion from dam to a pipeline, and  
**S-20.720** change reservoir location from on-stream to off-stream (under  
specific conditions) do not expand the parameters of the diversion  
from the source and are, therefore, acceptable without notification  
of persons not parties to the proceedings.

**B-21.780** Test for availability of unappropriated water consists of proving  
**U-14.1259.00** the physical presence of water at the intended point of diversion in  
**U-14.1274** the amount applied for at the times it is proposed to be put to use.  
(Based on 1989 amendment of 85-2-311(1)(a) as discussed in  
Department policy memorandum titled "Summary Report: Clark Fork  
Basin Water Use" dated 4/24/90.)

**T-5.800** Applicant, on its own initiative, represented that the project would  
be designed and operated according to a specific plan they developed  
and imposed upon themselves; therefore, the elements of this plan  
must be included as conditions of the permit.

<b>Final Order Date:</b>	10/17/90 MODIFIED	<b>Applicant:</b>	Durocher
<b>Case #/Type:</b>	68514-s41M (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	10/04/88	<b>Examiner:</b>	Rodriguez
<b>Hearing Date:</b>	03/23/89	<b>Use:</b>	Stock

[Proceeding under § 85-2-306(3), MCA, revocation/modification of stock water permit.]

**A-4.930**                   Where potential for future adverse impact exists because dam cannot pass water until water level reaches one foot below crest of dam, the permit must be modified to allow for bypass of flows necessary to senior appropriators. (Final Order reversed Conclusion of Law 9 & 10. This nullifies the first issue of the Summary.)

**A-4.930**                   Department cannot prevent a water user from enjoying his right based  
**J-21.800**                   on allegations of possible exercise in a tortious manner.  
**P-18.720**

**E-22.480**                   Opinion of a nonexpert who has had occasion to observe dam is  
**J-21.800**                   admissible in relation to determining the safety of the dam, although it may not be accorded as much weight as expert testimony. However, safety of the dam is not an issue in this proceeding.

**E-22.480**                   Department determination that Scoffin Creek is intermittent stream  
**S-15.920**                   correct based on evidence available.

**E-24.4879**                  Subirrigation is an unreasonable and thus unprotectable means of  
**M-5.1188**                  diversion.

**J-21.800**                   Department hearing is not the forum for objections based on adverse  
**P-18.720**                   impact to other rights besides water rights.

**APPEALED TO DISTRICT COURT. DEPARTMENT DECISION UPHELD.**

<b>Final Order Date:</b>	11/02/90 (G W/C)	<b>Applicant:</b>	Vescovi Polled Herefords
<b>Case #/Type:</b>	61414-40A (P) 61415-40A (P) 68191-40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/28/86 05/28/86 07/01/88	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/23/90	<b>Use:</b>	Irrigation

**B-21.780**                   Applications **61414** and **61415** - Applicant unable to meet 85-2-311(1)(A). Study showed water unavailable for two months of proposed period of use. Applicant did not indicate during hearing that he would accept truncated period of use. **[DENIED]**

Application **68191** - Appropriating in off-season to fill off-stream reservoir for use when there are no unappropriated waters. **[GRANTED]**

<b>Final Order Date:</b>	11/07/90 (D)	<b>Applicant:</b>	Crumpled Horn
<b>Case #/Type:</b>	54694-g410 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/26/84	<b>Examiner:</b>	Griffing
<b>Hearing Date:</b>	10/24/89	<b>Use:</b>	Irrigation/Stock

**A-16.750**                   Cannot grant a permit for "all" the water in a source "after Otness

**B-5.6979** has used it". Too vague to administer; cannot determine reasonableness of amount requested.

**O-2.490**  
**S-21.6621**  
**U-14.120** Objectors to application not estopped from objecting because a decision has been issued in another case concerning existence of unappropriated waters in the same source, when parties and issues not the same.

**S-21.6621** Applicant averred that the Department had already determined in **In re Otness (54693)** that there was unappropriated water in McCormick Coulee. Held, that there was no final order out in Otness, and further that even if there were, the findings and conclusions therein would not be binding in this proceeding because collateral estoppel does not apply as not all the parties and issues are the same.

**U-14.1259** Only evidence regarding availability of unappropriated natural flow of McCormick Coulee are flows and claims, and the claims to that water far exceed the flow. Held, evidence does not show that any of natural flow is unappropriated water.

**U-14.1259.25** Crumpled Horn did not develop any water; therefore, it cannot circumvent prior appropriations on McCormick Coulee absent some clear and enforceable agreement with Otness, the actual developer of water.

**U-14.1259.25**  
**W-1.870** Once water leaves the control of the developer, it becomes waste and is subject to appropriation as such. However, once it joins a natural water course and commingles with natural waters, it becomes part thereof and is subject to new appropriation only if there is water available after the senior rights have been satisfied.

**D-21.310** Time periods specified in statute for Department actions on applications are directory rather than jurisdictional. (Final Order).

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<b>Final Order Date:</b>	11/08/90 (G W/C)	<b>Applicant:</b>	Johnson
<b>Case #/Type:</b>	074154-g41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/16/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/30/90	<b>Use:</b>	Irrigation

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**S-15.920** Groundwater over-appropriation in the absence of long-term records cannot be interpreted from low stream flows and declines in the shallow water table when those observations were taken during a drought period.

**[GRANTED]**

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<b>Final Order Date:</b>	11/09/90 (D)	<b>Applicant:</b>	Heppenheimer
<b>Case #/Type:</b>	72443-41A (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/21/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/25/90	<b>Use:</b>	Fire Protection

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**J-21.800**  
**L-1.940**  
**M-5.1129** A permit is not required for emergency fire protection. Ditch rights and easements are not requisite to granting a permit. Water rights and ditch rights are not synonymous. Whether applicant has an easement to construct or use ditch not relevant to determine proposed diversion is adequate.

<b>Final Order Date:</b>	11/14/90 (G W/C)	<b>Applicant:</b>	Hanson
<b>Case #/Type:</b>	G45422-76M (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/22/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	03/09/90	<b>Use:</b>	Irrigation

**S-20.110** Denied Applicants' Motion to Dismiss on grounds of prior approval,  
**S-21.660** ratification, and acceptance. Statements made by potentially  
affected party prior to notice of application for change do not  
estop them from objecting. Statutory system established by Water Use  
Act, allowing the filing and hearing of timely and valid objections,  
cannot be circumvented.

**A-4.930** Department does not have jurisdiction to consider adverse effects to  
**J-21.800** private contracts. There is nothing in § 85-2-402 that can be  
construed to authorize denial due to adverse effects on interests  
other than water rights.

**A-4.9379** Reduction of return flows by conversion from flood to sprinkler is  
not adverse effect. Right holder can change flow of waste so long as  
not with malice or through negligence. Furthermore, Applicants can  
change from flood to sprinkler without Department approval. However,  
an appropriator does not have the right to consume, to the injury of  
subsequent appropriators, amounts formerly returned to the source.  
[FO]

**A-4.9373** Downstream junior appropriator has vested interest in stream  
**E-24.4831** conditions implicit in the exercise of his water right. To give  
effect to junior's vested right, attention must be paid to  
disruptions in pattern of historic use. Therefore, Applicants must  
"fill in" the general outline of their right, even if previously  
outlined in a court decree.

**E-24.4831** To prevent adversely affecting Objector, Applicants' diversion must  
**T-5.800** be limited to the well-established pattern of historical use, i.e.,  
alternating weeks.

**R-5.930** Objector's Exceptions state that the Proposed Order is consistent  
**S-20.110** with law and would alleviate adverse impacts to Objector. The  
Department is not required to consider exceptions from parties that  
are not adversely affected by a proposal for decision. ARM  
36.12.229(1). Because the Department will be adopting the Proposal  
as written, Objector will not be adversely affected and the  
Exceptions are moot. [FO]

[FO appealed to District Court in Missoula. Court remanded for  
further findings on adverse effect and suggested the Department  
replace the existing conditions with appropriate conditions amicable  
to both parties. Department issued Addendum to Final Order giving  
additional explanation of the conditions imposed by the Final Order  
and explaining that suggestion of the Court could not be carried out  
within the statutory confines of the Water Use Act. Authorization  
issued with limits and conditions imposed in the Final Order.]

<b>Final Order Date:</b>	11/15/90 (D)	<b>Applicant:</b>	Fee/Carlson
<b>Case #/Type:</b>	72662-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/26/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/09/90	<b>Use:</b>	Mining

**U-14.1274** Applicants failed to prove that, at least in some years, sufficient unappropriated water would be physically available at the point of diversion to supply their needs throughout the period of diversion.

**A-4.9325** Applicants asserted nonconsumptive use, yet were unable to provide proof water would be returned to source without significant delay so that the downstream conditions would suffer little or no disruption.

**J-21.800** Proposal did not adversely affect objector, therefore objector's exceptions were not properly before the Department. Section 36.12.229(1) ARM. **[FO]**

**S-21.6621** If an application is denied, nothing in the Water Use Act precludes submission of a new application for the same appropriation as long as it is bona fide, is complete and correct, and if the elements of the application or other circumstances framing the issues in the matter are different.

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<b>Final Order Date:</b>	11/27/90 (G W/C)	<b>Applicant:</b>	Meadow Lake County Water & Sewer District
<b>Case #/Type:</b>	71015-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/24/89	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	05/23&24/90	<b>Use:</b>	Irrigation

**B-5.690** Irrigation of a golf course is a beneficial use of water.

**B-5.690** Use of water for domestic purposes does not rank higher than use for irrigation of a golf course. The Montana legislature has not established a preference system for ranking water rights according to purpose. To the contrary, Montana courts have long and consistently held that "first in time, first in right," in other words, priority of appropriation confers superiority of right, and without reference to the character of the use.

**B-5.6979** Sodding with typical turf grass and irrigating the entire play area are both reasonable elements of the construction and operation of a golf course. The existence of more water efficient alternatives to the proposed use does not necessitate the denial of the permit.

**E-22.480** Although diverting water without a permit is a misdemeanor and  
**J-21.800** criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

**J-21.800** Applicant represented to Department and Objectors that well would be  
**M-5.110** completed to divert from a minimum depth. As this  
**T-5.800** representation was relied upon in analyzing lithological influences relative to the potential for adverse effects, this design element must be included as a condition of the permit. This condition falls within the Department's conditioning authority because it ensures that the water appropriated will be that which was proved to be available without adverse effect.

**J-21.800** The Department cannot impose a condition upon anyone other than the  
**T-5.800** permittee as only the permittee is required to satisfy the permit criteria. The Water Use Act only allows the Department to issue a permit with terms and conditions necessary to satisfy the permitting

criteria. As the monitoring plan proposed by the applicant involves the participation of the objectors, it cannot be imposed as a whole through conditions on the permit. Only those parts relating to the criteria and the applicant can be adopted as conditions on the permit.

<b>Final Order Date:</b>	12/16/90 (G W/C)	<b>Applicant:</b>	Hollenback
<b>Case #/Type:</b>	05/13/90 [FO - On Remand] 63377-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/15/86	<b>Examiner:</b>	Elting Siroky [OA & On Remand]
<b>Hearing Date:</b>	02/19/88 07/28/88 [OA] 11/29/89 [On Remand]	<b>Use:</b>	Irrigation

**A-4.930** To assure no adverse effect, the permit shall be conditioned to  
**O-2.490** require applicant to prepare a plan each season, after consultation  
**T-5.800** with objector, of the planned schedule of water use that will not  
**U-14.120** interfere with objector's senior stock water right.

**A-4.9321** Given the varied pattern of historic stock water use by the  
**E-24.4831** the objector's predecessor and applicant's admission that he does  
**U-14.120** not need full-service irrigation through his requested period of  
use, it is reasonable to conclude that there may be some water  
available for applicant when objectors are not using it for stock.  
Held, subject to call of objectors when they need the source for  
stock water, applicant shall be entitled to appropriate water from  
the source. This maximizes the use of Montana's waters, pursuant to  
§ 85-2-101(3).

**E-22.480** A Notice of Appropriation may not serve as prima facie evidence of  
**E-24.4831** an existing water right if there was any nonconformance with the  
requisites in R.C.M. 89-810 (1947), e.g., excavation or construction  
was not initiated with 40 days of posting or the filing document was  
not completed with the facts and specificity required in R.C.M. 89-  
810 (1947). Cites **Holmstrom v. Newlan**. Nevertheless, in this case  
proof of a use right was produced.

**E-22.480** Proposal for Decision concludes objector never perfected water right  
**E-24.4831** for stock use during summer months. Exceptions filed on this finding  
**R-5.930** by objector. Final order upholds finding in Proposal as clearly  
based on the facts presented at the evidentiary hearing. Objector  
filed for judicial review. Court orders that additional evidence be  
received concerning the summer use of the stock water right, finding  
that there is substantial uncertainty in the testimony of objector's  
witness, and therefore several issues were not fully explained by  
the evidence. Evidence of some summer use by objector's predecessors  
is produced at the hearing on remand.

[Permit issued with conditions]

<b>Final Order Date:</b>	01/03/91 (G W/C)	<b>Applicant:</b>	Aseltine
<b>Case #/Type:</b>	70817-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	04/05/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	10/11/89	<b>Use:</b>	Irrigation

**E-24.4894** Generally, an owner of a right to use water may collect and reuse it  
**U-14.1259** it leaves his possession, but, after leaving his possession, it



W-1.870 becomes waste and is subject to appropriation by another. **Rock Creek Ditch of Flume Co. v. Miller**, 17 P.2d 1074.

W-1.870 Waste water right only good as against junior appropriation if same user cannot compel generator of waste to continue generating it.

**GRANTED**

<b>Final Order Date:</b>	02/07/91 (G W/C)	<b>Applicant:</b>	Murray
<b>Case #/Type:</b>	73404-76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/17/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/27/90	<b>Use:</b>	Commercial

E-24.4879 Objectors having to partially dam source to raise water level to flow into headgate located high above creek bottom is not an adverse effect.

A-4.9321 Having to call a junior appropriator for water is not an adverse effect.

A-4.9383 Although there may be a connection between Applicant's source and  
B-21.780 Objector's source, it must remain speculative, without data from  
U-14.1259 Applicant's actual use, whether the waters intended to be used are part of the surface flows. If it is determined through Applicant's use that a connection exists. There was no evidence in record that the water is appropriated. Held no adverse effect.

**[GRANTED]**

<b>Final Order Date:</b>	03/04/91 (G W/C)	<b>Applicant:</b>	Blair
<b>Case #/Type:</b>	68173-s41S (P)	<b>Regional Office:</b>	Lewistown
	68174-s41S (P)		
<b>Application Date:</b>	07/01/88	<b>Examiner:</b>	Griffing
			Lighthizer (OA)
<b>Hearing Date:</b>	09/12/89	<b>Use:</b>	Irrigation/Stock
	01/30/91 (OA)		

E-24.4879 Whether stock water users entitled to natural flow for "recharging"  
T-5.800 of stream bed and flushing out of alkali. Held, bypass of 6 cfs during heavy stock water use and 2 cfs in winter sufficiently provided for stock water rights.

M-5.110 Whether plans of dam were sufficiently specific to show adequacy of diversion when SCS was later to prepare plans. Held, plans adequate as long as dam built to SCS specifications and reviewed by Department and all parties.

M-5.11 Held, even though Applicant did not present detailed plans at hearing, the means of diversion construction and operation were adequate if constructed according to SCS specification upon approval of plan drawn or approved by SCS.

P-5.800 Compliance problems with previously issued permits have no relevance in a hearing for a new application.

T-5.800 Appropriator must bypass 6 cfs at all times and 7.67 when senior  
U-14.1259 Hilltop is appropriating. There are no unappropriated waters in source during July and August. Applicant may not divert during this period.

GRANTED WITH CONDITIONS. APPEALED TO DISTRICT COURT.  
CASE DISMISSED.

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Final Order Date:	03/05/91 (D)	Applicant:	T-L Irrigation
Case #/Type:	G31227-41F (C)	Regional Office:	Bozeman
Application Date:	01/05/89	Examiner:	Elting
			Siroky (OA)
Hearing Date:	03/29/90	Use:	
	12/14/90 (OA)		

- D-21.310 Applicant's position was that 85-2-308 may not be applied to change applications. Held, since 85-2-308 is the only code which sets forth the right of objection and is cross referenced to the change criteria, Objection procedure is intended to apply to changes. To hold otherwise would deprive potentially affected persons of access to administrative process.
- S-10.110 An objector cannot be excluded because he did not word his objection with sufficient specificity or the relevancy of his concerns is not apparent until Dept. has been able to obtain fuller information. The objection process provides a door by which any person filing an objection may enter the process.
- E-24.4831 The Dept. will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.
- E-24.4831 The Dept. has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if criteria of 85-2-402 have been met.
- J-21.800 A water right which allegedly was abandoned prior to 1973 clearly is within the jurisdiction of the water court. A water right abandoned after the issuance of a final decree is clearly within the jurisdiction of the Department.
- E-24.4810
- J-21.800 Protective covenants such as real property covenants, contractual obligation, and breach of fiduciary duties belong in the district court forum. The Dept. does not have jurisdiction on ownership issues.
- O-21.800 The testimony of a life long resident of the area and an irrigator with great experience with water conditions on source is entitled to great weight. Expert witnesses' testimonies not sufficient to counterbalance testimony of actual users. **Cites Wordan v. Alexander.**
- A-4.9373 An appropriator who has developed irrigation practices based on a senior appropriator's historic pattern of use has a vested right to maintenance of the stream conditions which existed at the time of their arrival on the source. A senior appropriator cannot change the pattern of use to the detriment of junior appropriators. **Cites In re Bozeman 20736-41H; In re Bozeman 20737-41H; In re Bladholm 9782.**
- B-21.780 A Statement of Claim does not provide any information as to how much of the diverted water was consumed pursuant to the historic use of the historic pattern of use within the outside parameters of the claimed period of diversion. Therefore when Objectors allege the proposed change will increase the demands on the stream or will adversely affect their prior rights by altering the stream

conditions, Applicant must provide evidence which allows the impact to be assessed by comparing effects caused by proposed use.

**A-4.9373**

Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

**(Denied)**

**(SEE ALSO Summary for Combs Cattle Co.)**

<b>Final Order Date:</b>	03/25/91 (D)	<b>Applicant:</b>	Combs Cattle Co.
<b>Case #/Type:</b>	G31227-02-41F (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	03/13/89	<b>Examiner:</b>	Elting Siroky (OA)
<b>Hearing Date:</b>	03/29/90 12/14/90 (OA)	<b>Use:</b>	

**S-10.110**

An objector cannot be excluded because he did not word his objection with sufficient specificity or the relevancy of his concerns is not apparent until Dept. has been able to obtain fuller information. The objection process provides a door by which any person filing an objection may enter the process.

**E-24.4831**

The Dept. will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.

**E-24.4831**

The Dept. has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if criteria of 85-2-402 have been met.

**J-21.800**

**E-24.4810**

A water right which allegedly was abandoned prior to 1973 clearly is within the jurisdiction of the water court. A water right abandoned after the issuance of a final decree is clearly within the jurisdiction of the Department.

**J-21.800**

Protective covenants such as real property covenants, contractual obligation, and breach of fiduciary duties belong in the district court forum. The Dept. does not have jurisdiction on ownership issues.

**O-21.800**

The testimony of a life long resident of the area and an irrigator with great experience with water conditions on source is entitled to great weight. Expert witnesses' testimonies not sufficient to counterbalance testimony of actual users. **Cites Wordan v. Alexander.**

**A-4.9373**

An appropriator who has developed irrigation practices based on a senior appropriator's historic pattern of use has a vested right to maintenance of the stream conditions which existed at the time of their arrival on the source. A senior appropriator cannot change the pattern of use to the detriment of junior appropriators. **Cites In re Bozeman 20736-41H; In re Bozeman 20737-41H; In re Bladholm 9782.**

**B-21.780**

A Statement of Claim does not provide any information as to how much of the diverted water was consumed pursuant to the historic use of the historic pattern of use within the outside parameters of the claimed period of diversion. Therefore when Objectors allege the proposed change will increase the demands on the stream or will adversely affect their prior rights by altering the stream

conditions, Applicant must provide evidence which allows the impact to be assessed by comparing effects caused by proposed use.

**A-4.9373**

Applicant failed to meet its burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

**(Denied)**

**(SEE ALSO Summary for T-L Irrigation)**

<b>Final Order Date:</b>	03/25/91 (G W/C)	<b>Applicant:</b>	Zarnowski
<b>Case #/Type:</b>	67795-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	03/15/88	<b>Examiner:</b>	Scott
			Lighthizer (OA)
<b>Hearing Date:</b>	04/14/89	<b>Use:</b>	Stock
	03/06/91 (OA)		

**A-4.930** Objector with no water right cannot be adversely affected.

**A-4.930** Diversion of water which has already been rightfully reduced to possession by a prior appropriator will adversely affect his water right. Permit must exclude that possibility.

**A-4.9321** Having to call for water more often not in itself adverse effect.

**M-5.1129** Question of applicant's legal entitlement to cross and/or use objector's property not relevant to adequacy of means of diversion.

**S-15.920** Water in onstream reservoir consists of water reduced to possession already (impounded), water destined for downstream reservoir is  
**S-20.720** is unappropriated water. Applicant may not divert the first at all,  
**U-14.1259.00** may not divert the second after he has been called, but may divert the third.

**U-14.120** [Cites Hadley test.]

**U-14.1259** Senior appropriator has called for water only once in 13 years of applicant's operation of a larger diversion under other right. Held, water legally available.

<b>Final Order Date:</b>	04/04/91 (G W/C)	<b>Applicant:</b>	Unified Industries/ City of Pinesdale
<b>Case #/Type:</b>	69638-s76H (P) 69659-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/04/88 10/14/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	08/17/90	<b>Use:</b>	Irrigation

**E-22.480** Although diverting water without a permit is a misdemeanor and  
**J-21.800** criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

**B-5.6979** Applicant is not bound to use alternative sources to which they have  
**B-5.690** water rights, and is not precluded from establishing a new approp-

S-15.920                   riation establishing a new appropriation for the same purpose from an additional source.

M-5.110                   Nothing in statutes, rules, case law, or Department precedent requires Department supervision of the construction of diversion devices.

A-4.9392                   Contention that, since system can divert more than permitted,  
M-5.110                   operation of the diversion and conveyance systems will not be adequate because permit issued to applicant would be impossible to administer is not within scope of whether criterion on adequacy of diversion system has been met. Goes to issue of possible unenfor-  
cability. Other than proving the system is capable of controlling the amount of water it diverts, showing a permit can be enforced is not a criterion for issuance.

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Final Order Date:	04/12/91 (D)	Applicant:	Pitsch
Case #/Type:	61333-s40A (P)	Regional Office:	Lewistown
Application Date:	12/11/85	Examiner:	Stults
Hearing Date:	10/18/90	Use:	Irrigation

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E-22.480                   Merely indicating that whatever is needed will be installed, without  
M-5.110                   submitting plans, is not sufficient to prove appropriation works will be adequate. **Cites M.G. Moss, 60073-s76L.**

E-22.480                   A commitment by applicant to construct project in accordance with  
M-5.110                   SCS design could serve to meet applicant's burden of proof. **Cites Blair, 69173-s41S.**

E-24.4879                   It is not responsibility of applicant to ensure that diversion works  
M-5.110                   of others are adequate and will be operated in accordance with the priority system on the source. Applicant only has responsibility for own system.

E-24.4879                   Where a dam must be able to bypass the flow of the stream to respond  
M-5.110                   to calls of downstream seniors, applicant must show how much the  
S-20.720                   design of the dam will let pass. **Cites Goffena, 61293-s40C.**

B-21.780                   Since applicant is required to show by substantial credible evidence  
D-21.310                   that all criteria have been met and applicant failed to show 311(1)  
S-21.660                   (c) had been met, no finding is necessary on the other criteria.  
**Cites Carney, 53221-s400.** Denying application at this point does not determine that proposed appropriation could not be granted given sufficient evidence on the 311(1)(c).

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Final Order Date:	04/12/91 (G)	Applicant:	Wilkinson
Case #/Type:	G042151-76N (E)	Regional Office:	Kalispell
Application Date:	12/13/84	Examiner:	McLane
Hearing Date:	05/10/89	Use:	Hydropower

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P-5.8031                   Although physical construction has not commenced, Permittee has clearly been active in legal, administrative and engineering aspects of project clearly showing good faith and due diligence.

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Final Order Date:	04/16/91 (D)	Applicant:	BLM
Case #/Type:	72399-s41D (P)	Regional Office:	Helena
Application Date:	08/01/89	Examiner:	Stults
Hearing Date:	10/16/90	Use:	Stock

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A-4.930                   The Department cannot consider late claims to be interests which may

E-24.4810 be adversely affected by a proposed appropriation of water.  
E-24.4831  
J-21.800

B-5.6979 Applicant is not bound to use alternative sources to which they have  
B-5.690 water rights, and is not precluded from establishing a new approp-  
S-15.920 riation for the same purpose from an additional source.

E-24.4879 85-2-311(1)(c) means applicant must show the proposed system can be  
M-5.110 constructed and operated to divert and deliver the amount of water  
requested reasonably efficiently and without waste, and to allow  
control such that it can be regulated in accordance with the system  
of priority on the source.

J-21.800 The Department does not have jurisdiction to decide land ownership  
disputes.

B-21.780 Since both parties characterize ownership of the place of use as a  
E-22.480 matter in dispute, documentation supports this, and no resolution by  
a court of competent jurisdiction or consent of objector is evident,  
applicant has not met criterion in § 85-2-311(1)(f). (Proposal for  
Decision)

B-21.780 Given the ambiguity of the evidence on ownership of the place of use  
E-22.480 and the limited scope of the Department's jurisdiction, the only  
conclusion that can be reached is that the criterion has not been  
met. Conclusion of Law not modified.

R-5.930 Because Proposal adopted that denies permit, objectors will not be  
adversely affected. Therefore, while they remain part of record,  
objectors' exceptions not addressed in Final Order. **Cites Hanson,**  
**G45422-76M.** [FO]

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<b>Final Order Date:</b>	05/22/91 (G W/C)	<b>Applicant:</b>	Cross
<b>Case #/Type:</b>	72498-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/25/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/07/91	<b>Use:</b>	Irrigation

A-4.9395 Although artesian flow and shallow wells are reasonable means of  
diversion, they are not protectable. Objector had in the past pumped  
from his source when it did not flow showing he could reasonably  
exercise his right when the artesian pressure was reduced.

A-4.9395 To hold that an appropriator is entitled to maintain shallow wells  
and artesian pressure against subsequent appropriators would be to  
allow a single appropriator or a limited number of appropriators to  
control an entire aquifer simply to make their own means of  
diversion easier.

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<b>Final Order Date:</b>	06/03/91 (G W/C)	<b>Applicant:</b>	Anderson
<b>Case #/Type:</b>	74297-s76M (P)	<b>Regional Office:</b>	Missoula
	G(W)012684-s76M (C)		
<b>Application Date:</b>	05/02/90 (P) & (C)	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/04/91	<b>Use:</b>	Recreation

B-5.690 A water use permit merely licenses a prospective appropriator to  
initiate his intended appropriation. Any rights evidenced by such a  
permit remain inchoate or conditional in nature until the permittee

actually applies the water allowed by the permit to beneficial use.  
**Cites Monforton 24921.**

**GRANTED WITH CONDITIONS**

<b>Final Order Date:</b>	06/03/91 (D)	<b>Applicant:</b>	Guthneck
<b>Case #/Type:</b>	74785-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/22/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/04/91	<b>Use:</b>	Stock/Domestic

**A-16.750** Priority dates, which are assigned by the date and time the applications are received by the Department, decide the outcome when two separate parties on the same source apply for a permit. The applicant in this case completed and signed the application materials before a notary on May 1, 1990. However, application was not received by the Department until May 22, 1990. In the interim, the other applicant filed his application with the Department on May 5, 1990. Applicant in this case argued intent to appropriate before opposition. The date of intent means nothing. Section 85-2-401(2).

**DENIED**

<b>Final Order Date:</b>	06/21/91 (D)	<b>Applicant:</b>	Gray
<b>Case #/Type:</b>	64965-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	12/02/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	10/26/88	<b>Use:</b>	Irrigation

**A-4.930**  
**B-21.310**  
**E-24.4831**  
**E-24.4834**  
**E-24.4848**  
**I-14.870** No evidence to suggest that objector's water rights would be adversely affected. No evidence that Bureau of Reclamation has any protectable water right for instream flow which could be adversely affected. BuRec has no claims on file for instream rights, and a Northwest Power Planning Council agreement does not establish a water right. Flathead Irrigation Project failed to show why their rights could not be reasonably exercised under whatever changed water conditions might be caused by applicant's appropriation. A general allusion to tribal fishing rights does not provide sufficient information for a finding of adverse effect because the amount of water needed to sustain the fishery has not be quantified.

**E-24.4834** Bureau of Reclamation claim for 3500 cfs minimum instream flow between Hungry Horse Dam and Flathead Lake for fish and wildlife not recognized.

**J-21.800** State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation. [Memo With P4D]

**B-21.780**  
**U-14.1259.00**  
**U-14.1274** Applicant failed to provide substantial credible evidence there are unappropriated waters. **Cites Hadley** for test for unappropriated waters. Water physically available but applicant failed to prove water present was not needed downstream to fulfill senior water uses. Flow data on needs of senior users that applicant provided is not probative, therefore applicant has failed to meet his burden of proof.

**F-5.250**  
**J-21.800** Objector USDI filed exception to proposal asserting that DNRC lacks jurisdiction over water on the Flathead Reservation. Since the application is being denied the issue of jurisdiction is moot as to this application. [FO]

<b>Final Order Date:</b>	06/21/91 (G/WC)	<b>Applicant:</b>	Johnson
<b>Case #/Type:</b>	71925-41B (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/06/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/29/90	<b>Use:</b>	Irrigation

A-4.9383 Groundwater and surface water are interconnected, but expert  
A-4.930 witnesses agree the loss of baseflow accretion to the Beaverhead River would be imperceptible. Mere diminution does not create adverse effect. **Cites Hunt.**

E-14.930 If applicant modifies well construction to allow surface waters to  
M-5.110 enter the casing, the well construction would be in violation of 85-2-505, MCA. Permit conditioned to prohibit such modification. [P4D]

D-21.310 Untimely exceptions stricken. Written arguments in lieu of oral  
O-2.490 arguments accepted but not given any weight because scope of oral  
R-5.930 argument hearing limited to scope of timely exceptions. [FO]

E-14.930 Record contains no evidence related to contamination of groundwater,  
E-22.480 therefore the conclusion reached and condition imposed by hearing  
M-5.110 examiner without basis in the record. Conclusion and condition  
R-5.930 modified. [FO]

B-5.690 Conditions modified and additional conditions imposed to ensure that  
E-14.930 all surface water put into the well casing is pumped back out. This  
T-5.800 This ensures that none of the surface water goes toward aquifer recharge instead of for its legally authorized purpose.

<b>Final Order Date:</b>	06/24/91 (G/WC)	<b>Applicant:</b>	McHugh Mobile Home Park
<b>Case #/Type:</b>	74661-g41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/06/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/30/91	<b>Use:</b>	Domestic

S-21.760 A condition must be placed on this permit to identify the redundancy  
T-5.800 of this permit with a claimed existing water right belonging to the owner of the well (not the permittee) through which water will be appropriated under this permit, and to prevent the use of this permit beyond the stated intent, i.e., as a substitute for any part of the existing right not recognized by the Montana Water Courts.

<b>Final Order Date:</b>	06/25/91 (G/WC)	<b>Applicant:</b>	Henry
<b>Case #/Type:</b>	74814-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/30/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/30/91	<b>Use:</b>	Wildlife

M-5.1129 Application for a flow-through wildlife pond on a ditch. Held granting a permit does not give an appropriator an easement or ditch right.

A-4.930 Application to appropriate water from Kootenai Creek to be transported via the ditch would actually add water to the ditch for senior right owners. Held no adverse effect.

<b>Final Order Date:</b>	06/26/91 (W) IO 10/03/89	<b>Applicant:</b>	Gardiner-Park
<b>Case #/Type:</b>	63865-g43B (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/15/87	<b>Examiner:</b>	Kerbel
<b>Hearing Date:</b>	07/21/89	<b>Use:</b>	Municipal



**A-4.9392** Permit conditioned to compel submission of workable plans for diversion which will not result in an unreasonable number of calls on permittee.

**A-4.9392**  
**U-14.1259** Where water is physically available, but is legally available only at certain times throughout the period of appropriation, applicant must, in order to prove the availability of unappropriated water, demonstrate a workable plan whereby water will cease to be diverted without the necessity for an unreasonable number of "calls" by prior appropriators.

**U-14.1259** Water is legally available if prior appropriators would not have to make an unreasonable number of "calls" on the permittee to obtain their water.

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<b>Final Order Date:</b>	07/26/91 (D)	<b>Applicant:</b>	Crop Hail Mgmt.
<b>Case #/Type:</b>	62935-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	04/25/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	08/11/88	<b>Use:</b>	Irrigation/ Recreation

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**U-14.1259.00**  
**U-14.1274**  
**B-21.780** Applicant showed water physically available for appropriation by producing evidence based on upstream diversions; however, he failed to show water legally available with information of downstream uses.

**S-20.110**  
**O-2.490** One who is not a party to a proceeding cannot file exceptions to Proposal. The Department is not required to consider exceptions from one who is not adversely affected by the Proposal. Here, because application was denied, objector was not adversely affected by the decision. [FO]

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<b>Final Order Date:</b>	07/31/91 (G/WC)	<b>Applicant:</b>	Carr
<b>Case #/Type:</b>	75997-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/15/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/22/91	<b>Use:</b>	Irrigation

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**A-4.9395** Although artesian flow is a reasonable means of diversion, it is not a protectable means of diversion.

**B-5.6979** Beneficial use is the base, limit and measure of the appropriative right. When an appropriator uses many sources to irrigate a single parcel of land, the total amount of water appropriated from the combined sources is limited to the amount that can be beneficially used. **Cites Toohey v. Campbell, Featherman v. Hennessey, Worden v. Alexander.**

**A-4.930** The supposition that future wells might cause an adverse effect is not sufficient to deny an application.

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<b>Final Order Date:</b>	08/15/91 (G W/C)	<b>Applicant:</b>	Peterson
<b>Case #/Type:</b>	76714-76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/04/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/30/91	<b>Use:</b>	Mining

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**J-21.800** The Department does not have jurisdiction to decide mining claim ownership disputes.

**B-21.780**  
**E-22.480** Both parties produced evidence of authorization from USFS to enter onto the place of use for mining. Section 85-2-311 (f) does not require exclusive possessory interest in the place of use.

**B-21.780** Applicant was able to provide substantial credible evidence the criteria for issuance of a permit had been met since Objectors' entire case was built on the possessory interest question.

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<b>Final Order Date:</b>	08/19/91 (G W/C)	<b>Applicant:</b>	Gray/Rhea-Gray
<b>Case #/Type:</b>	75685-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/24/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/19/91	<b>Use:</b>	Fish-Wildlife/Lawn & Garden/Stock

**E-22.480** Prior use of diversion works is admissible if relevant to ascertain ability of works to adequately function, whether such prior use was "illegal" or not.

**U-14.120** To comply with Section 85-2-311, applicant must prove that at least in some years, sufficient water will be available at the POD to supply the amount requested throughout the period of appropriation and that at least in some years, no legitimate calls for water will be made on him.

**O-2.490** Objectors modified stipulation before signing. Applicant did not sign modified stipulation; therefore stipulation not binding.

**A-4.930** Objector with no water right cannot be adversely affected.

**S-15.920** An appropriator cannot be compelled to forego his use of a water right just for the benefit of other appropriators on the source simply because he has another source available to him.

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<b>Final Order Date:</b>	08/30/91 (G)	<b>Applicant:</b>	So. Tribs. Milk River
<b>Case #/Type:</b>	Basin Closure	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/26/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	06/18/91	<b>Use:</b>	All, with exceptions

**A-16.7567** A proposal to close a drainage basin cannot be extended beyond its original published scope and then adopted without further notice and opportunity for presentation of evidence.

**E-24.480** A basinwide adjudication of existing water rights within the drainage basin need not be completed before Department takes final action on a proposal to close sources in the basin. Mont. Code Ann. § 85-2-309(3) (1989).

**J-21.800** The Department need not find, prior to proposing a closure or taking final action on such a proposal, that the statutory criteria for obtaining a new permit to appropriate water would be incapable of providing the same level of protection to existing water rights.

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<b>Final Order Date:</b>	09/26/91 (D)	<b>Applicant:</b>	Finlayson
<b>Case #/Type:</b>	75737-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/25/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/24/91	<b>Use:</b>	Irrigation

**B-21.780** Test for availability of unappropriated water consists of proving the physical presence of water at the intended point of diversion

**U-14.1259.00** in the amount applied for at the times it is proposed to be put to use. (Based on 1989 amendment of 85-2-311(1) (a) as discussed in

**U-14.1274**

Department policy memorandum titled "Summary Report: Clark Fork Basin Water use" dated 4/24/90.)

**W-1.870** Once waste water and seepage joins a natural water course and commingle with natural waters, it becomes a part thereof and is subject to new appropriation only if there is water available after the senior rights have been satisfied. Cites Popham v. Holoran.

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<b>Final Order Date:</b>	10/10/91 (D)	<b>Applicant:</b>	Brandt
<b>Case #/Type:</b>	77118-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	02/19/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/31/91	<b>Use:</b>	Irrigation

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**B-21.780** Since applicant is required to show by substantial credible evidence all criteria set forth in § 85-2-311 have been met and applicant failed to demonstrate 311(1)(c) had been met, no finding is necessary on other criteria. Cites Carney, 53221-s400 and Pitsch 61333-s40A. Denying application at this point does not determine that the proposed appropriation could not be granted given sufficient evidence on 311(1)(c).

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<b>Final Order Date:</b>	10/10/91 (G W/C)	<b>Applicant:</b>	Kreiman
<b>Case #/Type:</b>	77494-s42M (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	02/25/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/30/91	<b>Use:</b>	Irrigation

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**U-14.120** To fulfill § 85-2-311(1)(a) all that need be shown is there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is administrable.

**U-14.1259** Simply because claimed water rights exceed the yield of the drainage does not mean there are no unappropriated water in the drainage.

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<b>Final Order Date:</b>	10/17/91 (G w/C)	<b>Applicant:</b>	Beitl
<b>Case #/Type:</b>	75396-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/20/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	08/08/91	<b>Use:</b>	Domestic

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**L-1.940** The statutes controlling the application are those in effect at the time of filing.

**S-15.920** Under controlling law and given the evidence in the record, source applied for is surface water because the diversion structure will be collecting water beneath the surface of the land which is part of the surface water of Walker Creek.

**B-5.690** [Implicit in holding that diversion works are adequate and proposed  
**M-5.110** appropriation constitutes beneficial use is a finding that storage  
**S-20.720** to ensure a supply of water for diversion through a downstream infiltration gallery is a beneficial use.]

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<b>Final Order Date:</b>	10/23/91 (G w/C)	<b>Applicant:</b>	Mont. Dept. of Fish, Wildlife & Parks
<b>Case #/Type:</b>	G(P)3049-01-s76D (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	08/05/87	<b>Examiner:</b>	Beck Stults (OA)
<b>Hearing Date:</b>	10/19/88 04/16/91 (OA)	<b>Use:</b>	Irrigation

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[Heard jointly with G(P)3049-00-s76D by Glen P. & Rose J. Wood]

**A-4.9348.10**      The limit of a water right is the extent to which it was perfected  
**E-24.4831**      within the time permitted.

**L-1.940**      Hearing Examiner must not accept the terms of an agreement that is  
**O-23.690**      part of an ownership transfer without determining whether the terms  
**T-5.800**      are within the criteria and provisions of Title 85, Chapter 2, MCA.  
Proposal for Decision not changed to match parties' settlement  
agreement outlining their terms for transfer of the portion of the  
water right that is the basis for change application. (FO)

**E-24.4831**      Because the proposed change and ownership transfer indicate an  
**M-5.110**      undivided interest in the use of the flow, a restriction must be  
**O-23.690**      must be placed on the change authorization to ensure the permitted  
**T-5.800**      flow and volume are not exceeded. (FO)

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<b>Final Order Date:</b>	10/23/91 (G w/C)	<b>Applicant:</b>	Wood
<b>Case #/Type:</b>	G(P)3049-00-s76D (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/24/87	<b>Examiner:</b>	Beck
			Stults (OA)
<b>Hearing Date:</b>	10/19/88	<b>Use:</b>	Irrigation
	04/16/91 (OA)		

[Heard jointly with G(P)3049-01-s76D by MT Dept. of Fish, Wildlife & Parks.]

**A-4.9348.10**      The data contained in the Department's verification of a completed  
**E-24.4831**      permit is the basis from which a change in diversion or use has to  
be made. (P4D)

**A-4.9348.10**      If the proposed method of irrigation on one expanded area of use  
would be the same as the method used on the perfected acreage, then  
that expansion can only be allowed if another area is reduced. (P4D  
& FO)

**A-4.9348.00**      An increased use of water is a new appropriation and cannot be  
**A-4.9348.10**      allowed under the guise of a change application. (FO)

**E-24.4831**      Because the proposed change and ownership transfer indicate an  
**M-5.110**      undivided interest in the use of the flow, a restriction must be  
**O-23.690**      placed on the change authorization to ensure the permitted flow and  
**T-5.800**      volume are not exceeded. (FO)

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<b>Final Order Date:</b>	11/18/91 (IR-G W/C) (ST-D)	<b>Applicant:</b>	Galbraith
<b>Case #/Type:</b>	70402-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/21/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/07/91	<b>Use:</b>	Irrigation/Stock

**A-4.9348.48**      Proposed project will not appropriate water from Reeser Ditch. Said  
**T-5.800**      ditch will be used as carrier of waste water appropriated from  
hatchery; however, permit must be conditioned to require measuring  
devices to ensure that it remains so.

**E-24.480**      A waste appropriator cannot compel the continued generation of the  
**S-15.920**      waste unless its deprivation is malicious or arbitrary. Applicant  
**W-1.870**      would appropriate waste water from an existing fish hatchery and  
would not divert additional water from the source.

**A-4.9321** Objector expressed an aversion to calling a junior appropriator for water. The appropriative system by its nature contemplates the supply may be less than demand. First in time, first in right would never operate if no call were ever made. Cites MPC v. State ex rel Carey.

**A-4.9392** Stock water portion of application denied as unadministrable. Use of measuring devices allow administration of flow-through fish pond. Livestock, on the other hand, will drink from Reeser Ditch whether water is waste from hatchery or objectors' decreed water from Skalkaho.

<b>Final Order Date:</b>	12/06/91 (G w/C)	<b>Applicant:</b>	Thayer
<b>Case #/Type:</b>	G(W)114754-s43D ©	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	09/29/89	<b>Examiner:</b>	Lighthizer
		<b>O/A Examiner:</b>	Stults
<b>Hearing Date:</b>	09/05/90	<b>Use:</b>	Irrigation
	06/11/91 OA		

**O-2.490** Objectors "illegal" use of water not at issue. [P4D]

**B-21.780** Applicant failed to provide substantial credible evidence the  
**M-5.110** proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant failed to provide specifications of proposed ditches, dam, and did not even mention headgates or other control structures. Applicant failed to describe operation, whether the water would be diverted all season or just when needed. [P4D]

**B-21.780** Applicant must show their proposed system can be constructed and  
**M-5.110** operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. [FO]

**B-21.780** Although Department may place conditions on authorizations to ensure  
**M-5.110** they meet statutory criteria, it cannot summarily devise a design for construction and impose it on the Applicant, plus the Objector and all others on the stream, as adequate for regulation in conformance with priorities on source. It is the duty of Applicant to show such devices will be in place to control and limit water diverted from source within the limits of her water right, and that after commingling with other waters, secondary diversions are proportional to the original amount diverted. [FO]

**A-4.9348.00** Applicant's proposal will cause an increased burden of 8 miners inches. Any depletion of a stream constitutes a new appropriation which cannot be accomplished under a change of appropriation water right. [P4D]

**A-4.9348.00** Objector's subsequent use of return flows from Applicant's imported  
**A-4.9379** water is a windfall Objector could enjoy only so long as  
**E-24.4894** Applicant continues activity that augmented the natural flows.  
**U-14.1259.25** Objector cannot compel Applicant to continue activity solely for Objector's benefit. [FO]

**A-4.9379** The exclusive use of imported water (water which would not in the  
**E-24.4831** natural course of events be available in the source, but which is in  
**E-24.4894** addition to natural flows through the action of man) belongs to the  
**U-14.1259.25** person whose labors have created the additional water. [FO]

[F.O. originally denied change. Appealed to District Court, remanded to Dept. for further negotiations, settled and change was granted with conditions.]

<b>Final Order Date:</b>	12/13/91 (D)	<b>Applicant:</b>	Hedrich/Straugh/ Ringer
<b>Case #/Type:</b>	G(W)028708-41I (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/26/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	10/17/91	<b>Use:</b>	Irrigation

**A-4.9348.10**      There is nothing in the statutes to forbid a change that increases the acres irrigated as long as the flow rate and volume of water are not increased and there is no increased burden on the source of supply. **Cites Grether.**

**A-4.9348**            Any change authorization resulting in a greater use than that existing before the change is equivalent to the issuance of a new water right.

**B-21.780**           Applicants must make a **prima facie** showing of the existence of a water right to be changed.

**E-23.4831**  
**J-21.800**            Although it lacks jurisdiction to adjudicate a water right, the Department must be able to ascertain with reasonable certainty the scope of an existing right in order that it may determine whether a change can be authorized.

**E-22.480**            Although the filing of a Statement of Claim is **prima facie** proof of its content, evidence at the hearing held sufficient to overcome the claim.

**E-24.4831**           A water right is defined by actual beneficial use, not amount claimed or even decreed.

**A-4.9373**           Applicants failed to meet their burden of persuasion on the issue of whether the proposed changes will increase the burden on the source or result in changed stream conditions to the detriment of other appropriators.

<b>Final Order Date:</b>	01/16/92 (G)	<b>Applicant:</b>	Estate of Lena Ryen
<b>Case #/Type:</b>	P49632-41H (E) G(W)120401-41H G(W)120403-41H	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/30/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	10/22/91	<b>Use:</b>	Power Generation

**M-5.110**  
**P-5.800**            Alleged infeasibility of project overcome by evidence in record. Furthermore, no evidence in record indicates any delays were caused by infeasibility. Therefore, an extension of time not precluded by infeasibility of project.

**P-5.8031**            Events beyond the control of Applicant are reasonable justification for delay, and delay so justified is good cause for granting an extension of time when accompanied by due diligence. Cites Tortoreti; Vaira; Gunderson; and Rasmussen.

**O-2.490**  
**S-20.110**            Sec. 85-2-312(3) and 85-2-308 both allow for persons with interests that may be affected to file objections and be parties. Applicant did not show parties have no interests, therefore objections cannot be dismissed for lack of standing.

O-2.490                   Objections cannot be dismissed as deficient because they contain  
S-20.110                   statements of facts that objectors believe show lack of diligence.  
Ruling, October 16, 1991.

O-2.490                   Section 85-2-312(3), which says, "The department shall hold a  
S-20.110                   a hearing . . ." grants objectors the right to support their  
allegations by argument, however brief; and, if need be, by proof,  
however informal. Therefore, their objections, being properly filed  
cannot be dismissed without opportunity for a hearing.

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<b>Final Order Date:</b>	01/21/92 (G W/C)	<b>Applicant:</b>	Jensen
<b>Case #/Type:</b>	70420-g76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/13/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/19/91	<b>Use:</b>	Irrigation

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A-4.930                   There is no evidence that Objectors' prior right would be adversely  
B-21.780                   affected. Objectors failed to go forward and produce information  
that contrary to Applicant's evidence, the pressure head would be  
reduced to a point where Objectors would not be able to exercise  
their water rights.

E-22.480                   Although diverting water without a permit is a misdemeanor and  
J-21.800                   criminal sanctions may apply, the penalties do not include denial of  
a permit. The Department has no authority on such grounds. Whether  
the diversion works were first operated "illegally" is not relevant  
to how the data is used to satisfy the criteria for issuance of a  
permit.

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<b>Final Order Date:</b>	01/21/92 (G W/C)	<b>Applicant:</b>	Simons
<b>Case #/Type:</b>	70454-g76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/20/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/19/91	<b>Use:</b>	Irrigation

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A-4.930                   There is no evidence that Objectors' prior right would be adversely  
B-21.780                   affected. Objectors failed to go forward and produce information  
that contrary to Applicant's evidence, the pressure head would be  
reduced to a point where Objectors would not be able to exercise  
their water rights.

E-22.480                   Although diverting water without a permit is a misdemeanor and  
J-21.800                   criminal sanctions may apply, the penalties do not include denial of  
a permit. The Department has no authority on such grounds. Whether  
the diversion works were first operated "illegally" is not relevant  
to how the data is used to satisfy the criteria for issuance of a  
permit.

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<b>Final Order Date:</b>	02/20/92 (G W/C)	<b>Applicant:</b>	Meadow Lake Develop- ment Corporation
<b>Case #/Type:</b>	74002-s76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/23/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	08/07/91	<b>Use:</b>	Irrigation

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A-4.9394                   Other than proving the system is capable of controlling the amount  
M-5.110                   water it diverts, showing a permit can be enforced is not a  
T-5.800                   criterion for issuance. Noncompliance with conditions placed on  
previously granted appropriations is not grounds for denial of a  
proposed appropriation.

A-16.7567                   An expansion of the period of use of stored water does not imply an

S-20.720 increase in the burden on the source beyond what was identified in  
T-5.800 the notices because the impact on the source is confined to the initial diversion away from the natural channel into the sealed storage pond. Therefore, the application may be modified after public notice to expand the period of use of the stored water.

B-21.780 Applicant needed to prove that the off-stream reservoir, when  
M-5.110 complete, would be adequately constructed to prevent seepage.  
S-20.720 Applicant provided that proof by accepting the condition requiring  
T-5.800 Applicant to prevent seepage through a specified means of designing and constructing the pond that gives a high likelihood of success toward meeting that requirement.

S-20.720 Conditions added to permit requiring construction plans from a  
T-5.800 professional engineer be submitted to department and objectors; that objectors' comments be considered by department in reviewing plans; that the engineer supervise construction and initial operation to verify plans successfully stop seepage; and that department confirm after construction that seepage has been prevented.

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Final Order Date:	04/01/92 (G W/C)	Applicant:	Starkel/Koester
Case #/Type:	G(W) 008323-g76L ©	Regional Office:	Kalispell
Application Date:	03/21/91	Examiner:	Lighthizer
Hearing Date:	02/18/92	Use:	Irrigation

A-4.9395 A water right does not give an appropriator the right to install a  
E.22.4879 pump which reaches such a shallow depth into the available water supply that a shortage would occur even though diversion by others did not deplete the source below where there would be an adequate supply for the appropriator's lawful demand. **Cites McAlister, Hunt, MacMillan, Hildreth, Cross, and Carr.**

E-24.4879 Objectors' prior rights do not entitle them to prevent changes in  
M-5.110 the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

E-24.4879 Artesian flow is not a protectable means of diversion.

A-4.9395 The mere possibility that objectors' water pressure might be reduced is insufficient to constitute adverse effect.

A-4.9348 Appropriators are entitled to maintenance of original conditions  
B-21.780 unless the appropriation can be reasonably exercised under the  
E-24.4831 changed conditions.

E-24.4831 The Department has the authority to make administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding of criteria of 85-2-402 have been met.

A-4.9348.10 There is nothing in the statutes to forbid a change that increases the acreage irrigated as long as the flow rate and volume of water are not increased and there is no increased burden on the source of supply. **Cites Grether.**

E-22.480 Although the filing of a Statement of Claim is **prima facie** evidence of its content, evidence at the hearing held sufficient to overcome the claim.



**E-24.4831** A water right is defined by actual beneficial use, not amount claimed or even decreed.

**A-4.9348**  
**A-4.9395**  
**B-21.780** Objectors are concerned with the future of the aquifer and the effect of wells flowing without control. Applicants have no burden to disprove potential adverse effects which may be caused by possible future appropriations of groundwater in the area, or to disprove adverse effects that may be caused by uncontrolled flowing wells owned by other persons.

**J-21.800**  
**S-21.660** Applicant has used water on acreage not included in original water right without an Authorization to Change. Held, criminal sanctions may apply, however, there is not statutory authority to deny Authorization on such grounds.

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<b>Final Order Date:</b>	04/20/92 (D)	<b>Applicant:</b>	Pitsch
<b>Case #/Type:</b>	77335-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	04/10/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	02/25/92	<b>Use:</b>	Irrigation/Stock

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**B-21.780**  
**M-5.110** Applicants must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source.

**B-21.780**  
**D-21.310**  
**S-21.660** Since applicant is required to show by substantial credible evidence all criteria have been met and applicant failed to show 311(1)(c) had been met, no finding is necessary on other criteria. Cites Carney and Pitsch.

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<b>Final Order Date:</b>	04/22/92 (D)	<b>Applicant:</b>	Roberts
<b>Case #/Type:</b>	77304-s40C (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	02/21/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	01/08/92	<b>Use:</b>	Irrigation

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**B-5.6979**  
**B-21.780**  
**S-21.760** The proposed volume exceeds the maximum that could be used without waste under the proposal as stated by applicants which includes supplemental water from canal company. Evidence in the record is insufficient to determine the amount that would be beneficially used. Therefore, applicants have not proven that the proposed appropriation would be a beneficial use.

**B-21.780**  
**E-22.480**  
**U-14.1274** General USGS stream flow records provided by applicants and area-wide water availability projections by the department are not sufficient to overcome the collective testimony of objectors that water availability in the immediate vicinity of the proposed appropriation is critically low during the proposed period of use in almost all years. Without substantial credible evidence showing with specificity that water is available in the amount requested at the proposed point of diversion, the criterion has not been met.

**B-21.780**  
**D-21.310**  
**S-21.660** Since applicants must show that all the criteria are met and have failed to meet two, no finding is necessary as to the remaining criteria. Cites Carney (53221) & Pitsch (61333).

<b>Final Order Date:</b>	05/05/92 (D)	<b>Applicant:</b>	Diehl
<b>Case #/Type:</b>	77547-g41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	03/05/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	No hearing	<b>Use:</b>	Irrigation

A-16.7521      Applicant failed to appear at hearing. Application dismissed. File  
D-21.310      remanded to Processing Unit.

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<b>Final Order Date:</b>	06/01/92 (G W/C)	<b>Applicant:</b>	Stone Container
<b>Case #/Type:</b>	G(W)118495-76M (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/05/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	12/04/91	<b>Use:</b>	Industrial

E-24.4810      Without proof of intent to abandon, claimed water rights treated as  
legitimate even if not used for several years.

J-21.800      Only the water court has the authority to declare a claimed water  
right abandoned until a final decree has been issued.

E-24.4831      Subirrigation is recognized as a valid right. The limit of such  
M-5.1188      rights is the volume of water necessary to produce a comparable crop  
utilizing a conventional irrigation system.

E-24.4879      Objector does not have a right to continuance of the existing  
subirrigation so long as the right could be reasonably exercised by  
conventional diversion.

A-4.9395      Applicant who provided evidence that a lower groundwater level would  
B-21.780      not cause adverse effect to the objectors has met his burden of  
proof. Objectors who produced no evidence that the lower groundwater  
level would adversely affect them have not met their burden to go  
forward.

A-4.9395      To hold that an appropriator is entitled to maintain, against  
M-5.110      subsequent appropriators, a certain water level in a slough that  
barely penetrates an aquifer would be to allow a single appropriator  
or a limited number of appropriators to control an entire aquifer  
simply to make their own means of diversion easier.

M-5.110      There is nothing in the statutes that limits the distance a water  
A-4.9348.20      right may be moved.

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<b>Final Order Date:</b>	06/16/92 (D)	<b>Applicant:</b>	Bemis
<b>Case #/Type:</b>	78941-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/28/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/21/92	<b>Use:</b>	Irrigation

W-1.870      Waste water loses its character when it reaches a natural channel  
and flows in that channel with regularity from year to year. It then  
becomes part of the natural flow in the channel. **Cites Popham v.  
Holoron; Application 64600-s76H by Evans; Application 75737-s76H by  
Finlayson.**

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<b>Final Order Date:</b>	06/18/92 (G W/C)	<b>Applicant:</b>	Hirst
<b>Case #/Type:</b>	79155-g43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	08/27/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/14/92	<b>Use:</b>	Lawn & Garden

A-4.9348.00      Because the area of the place of use for lawn and garden purposes

**A-16.7567**  
**B-5.6979**  
**T-5.800** identified on the application and notice is greater than the actual acreage of lawn and garden within the legal land description of the place of use, and because the amount of acreage of lawn and garden within the place of use description can be expanded and such an expansion could result in an increase in the amount of water diverted, the permitted acreage in the place of use was reduced to the area of the existing lawn and garden use.

**A-4.9348.00**  
**A-16.7567**  
**S-20.720** Amending an application after public notice to add a small, lined reservoir for storing water after it has been diverted and prior to use does not imply an increase in the burden on the source beyond what was identified in the notices because the impact on the source is confined to the initial act of diversion.

**A-16.7567**  
**L-1.940** The Department may modify an application if it prepares a statement of its opinion and reasons therefore.

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<b>Final Order Date:</b>	06/30/92 (D)	<b>Applicant:</b>	Krueger
<b>Case #/Type:</b>	G(W)96362-41K (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/14/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	10/10/91	<b>Use:</b>	Irrigation

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**B-21.780**  
**M-5.110** Applicant must show their proposed system can be constructed and operated to divert and deliver the amount of water requested reasonably efficiently and without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Cites Pinesdale and Thayer.

**B-21.780**  
**D-21.310**  
**S-21.660** Since applicant is required to show by substantial credible evidence all criteria have been met and applicant failed to show 402(b) had been met, no finding is necessary on other criteria. Cites Carney and Pitsch.

**M-5.110** The proposed system relies on a crude system of natural conveyance involving running water across open ground where it would fan out in a sheet between the end of a ditch and a drainageway which in theory then collects the flow. Such a proposed system cannot be considered adequate under the Pinesdale/Thayer rule.

**APPEALED TO DISTRICT COURT. DNRC DECISION UPHELD.**

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<b>Final Order Date:</b>	07/09/92 (G W/C)	<b>Applicant:</b>	Van Dyke
<b>Case #/Type:</b>	70919-s41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/05/89	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/21/92	<b>Use:</b>	Fish Pond

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**A-4.9348.48** Legal requirement for a use to be nonconsumptive was met, i.e., that there will be little or no diminution in supply and that the water be returned to the source sufficiently quickly that little or no disruption will occur in stream conditions below the point of return.

**A-4.930** "Opening the flood gates" argument that future similar appropriations will threaten prior appropriators, is not relevant. Future appropriators must also go through permit process. **Cites Griff and Loomis/Edenfield.**

**E-22.480** Although diverting water without a permit is a misdemeanor and

J-21.800 criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first constructed "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit. **Cites Frost and Town.**

A-4.930 The Department cannot consider late claims to be interests which may  
E-24.4810 be adversely affected by a proposed appropriation of water.  
E-24.4831

A-4.930 Objector with no water right cannot be adversely affected.

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<b>Final Order Date:</b>	07/09/92 (G W/C)	<b>Applicant:</b>	Baldwin
<b>Case #/Type:</b>	77204-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/07/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/02/92	<b>Use:</b>	Irrigation/Stock

E-22.480 Applicant failed to show water was available in the amount requested  
S-15.920 during the proposed period of appropriation. The amount requested  
U-14.1274 was measured at times outside the proposed period of appropriation.  
Permit granted for the amount measured within the months of the  
proposed period of appropriation.

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<b>Final Order Date:</b>	07/29/92 (D)	<b>Applicant:</b>	McBride
<b>Case #/Type:</b>	64545-g76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/23/86	<b>Examiner:</b>	Scott (P4D) Stults (FO)
<b>Hearing Date:</b>	07/29/88	<b>Use:</b>	Domestic/Irrigation

A-4.930 Application is subject to 85-2-508, therefore, applicant must prove  
B-21.780 by preponderance of substantial credible evidence proposed  
appropriation will not adversely affect other appropriators by  
aquifer depletion. (P4D)

A-4.930 The hastening of a foreseeable adverse effect in itself constitutes  
S-15.920 an adverse effect. Present aquifer conditions show declining  
storage, therefore proposed appropriation will hasten onslaught of  
adverse effects of storage depletion. (P4D)

A-4.930 Because adverse effect could be eliminated with aquifer recharge  
I-14.900 augmentation, and because all other criteria have been met, the  
T-5.800 Department, in an Interlocutory Order, grants applicant three years  
to perform aquifer recharge augmentation equal to appropriated  
volume. (P4D)

I-14.900 If aquifer recharge augmentation efforts are successful, as  
T-5.800 evaluated by Department, permit will be granted with condition that  
Applicant only divert to extent of augmentation. (P4D)

D-21.310 Applicant failed to fulfill requirements of Interlocutory Order,  
I-14.900 therefore permit denied. (FO)  
T-5.800

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<b>Final Order Date:</b>	07/30/92 (G W/C)	<b>Applicant:</b>	Big Stone Colony
<b>Case #/Type:</b>	78511-g41QJ (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/25/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/17/92	<b>Use:</b>	Irrigation

A-4.9395 To hold that an appropriator is entitled to maintain wells that  
penetrate only the top of an aquifer against subsequent

appropriators would be to allow a single appropriator or a limited number of appropriators to control an entire aquifer simply to make their own means of diversion easier. **Cites Colorado Springs v. Bender, Alamosa-La Jara v. Gould, Wayman v. Murray City Corp., Doherty v. Pratt, McAllister, Hildreth, and MacMillan.**

**E-22.480**  
**J-21.800**

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties do not include denial of a permit. The Department has no authority on such grounds. Whether the diversion works were first operated "illegally" is not relevant to how the data is used to satisfy the criteria for issuance of a permit. **Cites Frost and Town.**

**J-21.800**  
**T-5.800**

A Hearing Examiner has no authority in a water right application hearing to order the Department to maintain a well monitoring program. A permit may be conditioned, restricted, or limited so the **Applicant** is required to take certain actions to prevent an adverse effect to prior appropriators, to make his means of appropriation, construction, and operation adequate, or to take some action which will satisfy the 311 criteria.

**L-1.940**

In Montana, there is no priority of use. Montana's water law is based upon the Prior Appropriation Doctrine; it matters not what the use is as long as the use is beneficial.

**APPEALED TO DISTRICT COURT. DNRC DECISION UPHELD.**

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<b>Final Order Date:</b>	08/04/92 (G W/C)	<b>Applicant:</b>	Valgamore
<b>Case #/Type:</b>	79178-s43B (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	09/18/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/15/92	<b>Use:</b>	Irrigation

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**A-4.930**  
**I-14.870**  
**R-5.850**  
**U-14.1259.00**

The record contains no evidence or contention that the water being applied for is reserved water or that it is other than unappropriated water. It is the intent of the applicant to appropriate high or "flood" waters. Furthermore, it is reasonable to assume that return flows will be a large percentage of the volume of water diverted and will return relatively quickly. Finally, the proposed appropriation will be callable by owners of reserved water rights. Therefore, the proposed use will not unreasonably interfere with planned uses for which water has been reserved. **Cites Lockwood, 54172-s43Q.**

**E-22.480**  
**T-5.800**  
**U-14.1274**

Evidence that water has been available after June once every 26 years does not substantiate unappropriated water is reasonably available for an open ditch flood irrigation system without storage. Application denied as to proposed period of appropriation after June of each year.

**M-5.110**  
**T-5.800**

The Department may issue a permit subject to limitations and restrictions necessary for the permit to be in conformance with the statutory criteria. Because Applicant's diversion works are capable of diverting more water than the combined amounts of Applicant's two water rights, a condition must be placed on the permit requiring a measuring device on the diversion works to insure that the amount of water diverted does not exceed Applicant's water rights.

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<b>Final Order Date:</b>	09/16/92 (Rev.)	<b>Applicant:</b>	Potts
<b>Case #/Type:</b>	14538-g41H (R)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	08/01/79	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

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D-21.310 Informal conference procedure used as an attempt to avoid revocation hearing.

D-21.310 Permittee was ordered to file Notice of Intent to Appear at Show  
S-21.6625 Cause Hearing. Permittee failed to comply with Order, therefore hearing was vacated and Final Order was entered.

J-21.800 Department has the power to revoke a permit.

J-21.800 Department has authority to inspect permitted appropriations to  
P-5.8021 determine whether completed in accordance with permit.

B-21.780 Permittee's failure to show that water has been appropriated and put  
P-5.800 to beneficial use is sufficient grounds for Department to revoke a permit.

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<b>Final Order Date:</b>	09/19/92 (G W/C)	<b>Applicant:</b>	Locatelli
<b>Case #/Type:</b>	78425-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/11/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/07/92	<b>Use:</b>	Lawn & Garden

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S-15.920 Objector contended proposed source was part of its ditch  
E-22.480 system and that Applicant had no right to divert from that source. Site visit after hearing proved otherwise.

A-4.930 Objector's point of diversion upstream from Applicant's proposed point of diversion. Held no adverse effect.

M-5.110 Evidence that Applicant's proposed means of diversion and operation  
E-22.480 was so minimal that it was barely substantial or credible. Proposed appropriation so small Applicant need not provide an elaborate detailed plan for his means of diversion and operation.

**Granted with conditions.**

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<b>Final Order Date:</b>	09/29/92 (D)	<b>Applicant:</b>	Harris
<b>Case #/Type:</b>	79625-s76F (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	10/16/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/23/92	<b>Use:</b>	Irrigation

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E-22.480 The fact that a beaver once constructed a dam near the proposed point of diversion is not substantial credible evidence of an adequate means of diversion.

B-21.780 Since Applicants are required to show by substantial credible  
D-21.310 evidence that all criteria have been met and Applicants failed to  
S-21.660 show 311(1)(C) had been met, no finding is necessary on other criteria. **Cites Carney and Pitsch.**

**DENIED**

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<b>Final Order Date:</b>	09/29/92 (G W/C)	<b>Applicant:</b>	King
<b>Case #/Type:</b>	73904-s76M (P)	<b>Regional Office:</b>	Missoula
	74242-s76M (P)		

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**Application Date:** 02/14/90 **Examiner:** Lighthizer  
03/27/90  
**Hearing Date:** 06/24/92 **Use:** Dom/Irrig/Stock

**U-14.120** While water may be physically available at all times for power generation, there would be times Applicant would dewater the reach of stream between the intake and the discharge points of the power plant if water were diverted for hydropower. However, all that need be shown is that there is sufficient water in at least some periods for his appropriation. **Cites Allred; Kreiman.**

**A-4.930** Having to call for water is not an adverse effect. The appropriative system by its very nature contemplates that the supply is less than the rights on a stream. That is the foundation for the rule of which appropriator is to forego exercise of its rights in those times of shortage. "First in time, first in right" would never operate if no call were ever made. **Cites MPC v. State ex rel. Carey.**

**J-21.800** The Department is not bound by an agreement between the Applicant and Lolo National Forest. Only those portions of the agreement relating to fulfillment of the statutory criteria may be included in permit conditions.

**GRANTED WITH CONDITIONS.**

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**Final Order Date:** 10/06/92 (D ALL) **Applicant:** Gordon Cattle Co.  
**Case #/Type:** G(P)000960-s40J © **Regional Office:** Havre  
G(W)114281-s40J (C)  
71680-s40J (P)  
**Application Date:** 03/01/91 **Examiner:** Lighthizer  
01/11/90  
01/11/90  
**Hearing Date:** 03/10/92 **Use:** Irrigation/Stock

**A-4.930** Applicant and Objectors reached an agreement to settle objections  
**B-21.780** after the hearing was held. Regardless, Department must review  
**E-22.480** record to determine whether the criteria for issuance of a permit  
**U-14.120** and change were met. Held the criteria was not met for permit application nor for the change applications.

**A-4.9348.10** Applicant must prove by measurements and/or other documentation to  
**U-14.120** support the net depletion theory such as delivery and conveyance efficiencies or standards and guidelines established by Federal and State agencies that amount of water claimed to be salvaged is truly salvaged before Department can issue an authorization to change for expanded acreage. **Cites G136329, G136330, and G136331 by DeBruycker.**

**U-14.1259** Although stream dries up between Applicant and Objectors, the water appropriated by the Applicant could be used to recharge the bed of the stream so that water would reach the Objectors. Thus, Applicant's assertion that water he wishes to appropriate would not make it to Objectors anyway is unfounded. **Cites 19535 by Campbell.**

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**Final Order Date:** 10/26/92 (G W/C) **Applicant:** Montana, State of  
Dept. of Education  
Fac. Serv. Dept.

**Case #/Type:** 78402-g76M (P)  
**Application Date:** 06/29/91  
**Hearing Date:** 09/10/92

**Regional Office:** Missoula  
**Examiner:** Stults  
**Use:** Institutional & Irrigation

**A-4.9312**  
**A-16.750**  
**M-5.110**  
The Department must not issue a permit for more water than a project will beneficially use, but may issue a permit for less than the amount of water requested. The maximum amount that can be used is less than the amount requested, therefore the permit must be limited to the lesser amount.

**A-4.9394**  
**E-14.930**  
**T-5.110**  
System must comply with 85-2-505. Therefore, conditions imposed to require testing to ensure that system does not contaminate or pollute groundwater.

**A-16.7516**  
**M-5.110**  
A permit cannot be issued for speculative proposals. Applicant has failed to show a bona fide intent to develop and use all points of diversion requested, therefore permit must be limited to the lesser number of points of diversion.

**A-4.9312**  
**M-5.110**  
**T-5.880**  
Project will be completed over a long period of time with 23 diversion wells and 23 injection wells. Project must be completed in substantial accordance with the design capacities and other evidence Applicant provided to prove the project would meet the statutory criteria for issuance of the permit. Therefore, conditions imposed requiring that the actual flow rate and volume of each well be certified to the Department after the completion of each of the four phases of the project.

**A-16.7576**  
**M-5.110**  
**T-5.800**  
**U-14.1259.70**  
Proposed appropriation is alleged and publicly noticed as being partly nonconsumptive. Therefore, conditions imposed to require testing for nonconsumptivity of project, i.e., the effectiveness of injection wells.

**B-5.690**  
The specific institutional use, heating and cooling of buildings is a beneficial use of water. The amount proposed for appropriation is reasonable.

**B-5.6979**  
**S-21.760**  
**T-5.800**  
Appropriations must not exceed amount necessary for beneficial use. Therefore, conditions and limits imposed defining conjunctive and supplemental uses.

**GRANTED WITH CONDITIONS.**

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<b>Final Order Date:</b>	10/29/92 (D)	<b>Applicant:</b>	Stellick
<b>Case #/Type:</b>	77283-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/08/91	<b>Examiner:</b>	Lighthizer
		<b>O/A Examiner:</b>	Siroky
<b>Hearing Date:</b>	04/02/92	<b>Use:</b>	Fish Pond
<b>O/A Hearing:</b>	08/27/92		

**A-4.9348**  
**E-22.480**  
**S-20.72**  
Applicants asserted nonconsumptive surface water use; however did not provide method to determine the ground water level in proposed pond, thus unable to determine if surface water would be stored.

**B-21.780**  
**M-5.110**  
Applicants must show the proposed system can be operated reasonably and efficiently without waste to allow the control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source.



B-21.780 Since Applicants are required to show by substantial credible  
D-21.310 evidence that all criteria have been met and Applicants failed to  
S-21.660 show 311(1)(c) had been met, no finding is necessary on other  
criteria. **Cites Carney and Pitsch.**

**DENIED**

<b>Final Order Date:</b>	11/05/92 *	<b>Applicant:</b>	Takle
<b>Case #/Type:</b>	G(W)111151-76H (C) (G w/C)		
	76691-s76H (P) (D)		
	76692-s76H (P) (D)		
	72842-s76H (P) (D)		
	76070-s76H (P) (D)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/03/89 & 11/13/90	<b>Examiner:</b>	Lighthizer
		<b>O/A Examiner:</b>	Siroky
<b>Hearing Date:</b>	01/16/92	<b>Use:</b>	Irrigation/Stock
<b>Oral Argument Date:</b>	08/27/92		

J-21.800 On a decreed stream, the costs of distributing the water are set by the commissioner's report and the court. The Department has no jurisdiction to require applicants to pay the entire cost incurred by the water commissioner while admeasuring and distributing decreed waters.

S-15.920 The definition of groundwater at the time these applications were filed was, ". . . any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water." Mont. Code Ann. § 85-2-102(10) (1989).

S-15.920 Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary.

B-5.6979 The amount of stock water requested in each of the four Applications was .15 acre-feet of water per year. Applicants propose to keep four to six horses that would drink directly from the source. The total stock water use from all the ponds would be .146 of an acre-foot of water per year rather than .15 of an acre-foot of water per year from each pond. Held not waste if stock drink directly from the stream; however, if Applicant diverted .6 of an acre-foot of water for four to six horses, it would be more than the amount that could be beneficially used.

S-15.920 A water right can be established in waste wter from upgradient  
W-1.870 irrigation. Waste water not part of the decree.

A-4.930 Perhaps the adverse effect of the proposed appropriations would not be apparent immediately as indicated by the evidence, but any water taken upstream in a water-short source will be felt downstream as a shortage of water.

E-24.480 If, in fact, there is water available after the eighth right is shut  
S-15.920 shut off, it should be admeasured and distributed by the Water Com-  
U-14.1259.00 missioner to satisfy the decreed rights rather than attempt to  
create a permitted right on a source that cannot now support the  
demand by decreed water rights.

W-1.870 Seepage water along a stream belongs to the stream and its  
appropriators. **Cites Woodward v. Perkins. [FINAL ORDER]**

**APPEALED TO DISTRICT COURT. COURT UPHELD DNRC DECISION.**

\* The final decision for these applications is indicated next to the application numbers above.

<b>Final Order Date:</b>	11/17/92 (Gw/C)	<b>Applicant:</b>	Sund
<b>Case #/Type:</b>	78884-g76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/06/91	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	09/30/92	<b>Use:</b>	Irrigation
<b>A-4.9348.00</b>	Objector alleged Applicant's proposal may be part of a cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. The law which provides a mechanism for pursuing issue of cumulative effects is § 85-2-319, or § 85-2-506 and 507, MCA.		
<b>A-4.9383</b>			
<b>A-4.9392</b>			
<b>B-21.780</b>			
<b>L-1.940</b>			
<b>A-4.930</b>	Reducing recharge to aquifer by ceasing deliveries of contract water is not an adverse effect because it would be discontinuing a practice that is exclusively under applicants' control. Other appropriators' benefit from such recharge is a windfall they enjoy only as long as the practice is continued, they cannot compel the activity solely for their benefit. [Dicta]		
<b>W-1.870</b>			
<b>E-22.480</b>	Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.		
<b>J-21.800</b>			
<b>L-1.940</b>	The condition stating the process for modification or revocation of the permit is simply an expression of existing law and is not unique to the circumstances of an individual application or permit. Therefore no error would result from omitting it from a permit.		
<b>T-5.800</b>			
<b>Final Order Date:</b>	11/23/92 (G)	<b>Applicant:</b>	Unified Industries
<b>Case #/Type:</b>	G(W)015930-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11-02-90	<b>Examiner:</b>	Stults
		<b>O/A Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/07/91	<b>Use:</b>	Municipal
<b>O/A Date:</b>	08/12/92		
<b>A-16.7576</b>	The published notice was correct, but it cannot be shown that the individual notices were correct and it appears they may not have been. No prejudice has been expressed or is apparent, however. Without an expressed or apparent harm, there is no need to readvertise.		
<b>D-21.310</b>			
<b>A-16.7567</b>	An amendment that decreases the amount of water to be changed does not imply an increased burden on the source which would cause prejudice, but rather the opposite, and therefore need not be advertised.		
<b>A-16.7576</b>			
<b>D-21.310</b>			
<b>B-5.690</b>	Nothing in the statutes prohibits changing the purpose of a previously decreed water right. In fact many irrigation water rights have been changed to municipal use, including previously decreed water rights.		
<b>E-24.480</b>			

**A-4.9373**                      The period of use of a water right being changed is limited to the  
**E-24.480**                      period of use of the historic purpose.

**A-4.9348.10**                  The place of use for municipal purposes can extend to entire area  
**B-5.690**                      within city limits because the establishment of a municipal water  
delivery system area is the type of project designed for gradual  
development. Furthermore, the establishment of fire hydrants in the  
undeveloped area is a manifestation of announced intent which can  
serve as the definition of the extent of the beneficial use. This  
does not, however, allow for expansion of the amount of water which  
can be appropriated under the subject water right.

**A-4.9392**                      In order for the water right to be administrable by the water  
**T-5.800**                      commissioner, the system must be constructed so that all water  
diverted is measured. The system cannot allow water to bypass the  
measuring devices.

**A-4.9321**                      An increase in the expense of employing a water commissioner does  
**M-5.110**                      not constitute adverse effect.

**E-24.4831**                      Measure of water right is quantity of water put to beneficial use  
**E-22.480**                      over reasonable period of time. Here, Applicant wants quantity  
calculated on constant use of 20 MI, 24 hours a day, over period of  
214 days when evidence in the record is that full service irrigation  
was available only one-quarter of time.

**J-21.800**                      Department has authority to make preliminary administrative  
**E-24.4831**                      determinations of scope and parameters of underlying right to extent  
necessary to fulfill its statutory duties of deciding if criteria in  
85-2-402 have been met.

**J-21.800**                      Department may reopen record to receive additional evidence by  
**E-22.480**                      affidavit when evidence in record is minimal and unclear.  
**R-5.93**

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<b>Final Order Date:</b>	11/30/92 (G)	<b>Applicant:</b>	Nelson
<b>Case #/Type:</b>	80964-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/25/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/22/92	<b>Use:</b>	Irrigation

**U-14.1259**                      Once the water leaves the possession of the original appropriator,  
**W-1.870**                      it becomes waste and is subject to appropriation by another. **Cites**  
**Perkins and Rock Creek Ditch.**

**W-1.870**                      Waste water right only good as against junior appropriation if same  
user cannot compel generator of waste to continue generating it.

**GRANTED.**

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<b>Final Order Date:</b>	12/04/92 (D)	<b>Applicant:</b>	Janney
<b>Case #/Type:</b>	76161-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	09/24/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	07/25/91	<b>Use:</b>	Stock

**A-4.9312**                      The proposed stock water use is not a new appropriation but a change  
**A-16.7516**                      to an existing right. Therefore the amount identified as a new  
**B-5.690**                      appropriation for stock cannot be granted and must be subtracted  
from the proposed appropriation.

A-4.9312           The change criteria are a subset of the criteria for issuance of a  
A-16.7576           permit. Changes may be considered in a proceeding publicly noticed  
D-21.310           as a permit application so long as other appropriators are not  
O-2.490            prejudiced, regardless of whether they are a party or non-party. If  
                      the proposed change suggests an increase in the burden on the source  
                      beyond that identified in the public notice, that would cause  
                      prejudice. The potential for increased burden inherent in the  
                      changes was not apparent in the public notice, therefore, the change  
                      cannot be considered.

<b>Final Order Date:</b>	12/08/92 (G w/C)	<b>Applicant:</b>	Magellan Resources
<b>Case #/Type:</b>	G(W) 96235-76GJ (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/19/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	05/11/92	<b>Use:</b>	Mining

A-4.930            "Proposed use" in 85-2-402(a) means the specific action that an  
B-5.690            applicant proposes to perform with the water, including the inherent  
L-1.940            attributes of the action, such as its location, timing, condition,  
                      and how consumptive the activity is.

A-4.930            Applicant does not have to prove that the past, ongoing, and future  
B-21.780            exploratory drilling program will not adversely affect other water  
E-14.930            rights. Such mining activities are regulated by Dept.of State Lands.  
J-21.800            Applicant must prove only that the specific proposed use of the  
                      water, the lubrication of drilling apparatus, will not adversely  
                      affect them.

A-4.9348           A change must not create a greater demand on the source than existed  
E-24.4831           under the previous use of the water right. The extent of the subject  
J-21.800            water right is less than the amount applied for, and only a portion  
                      of the claimed water right. This is not an adjudication of the water  
                      right. Should the final determination of the Water Court confirm the  
                      claimed amount, the authorization would be subject to  
                      reinterpretation. Furthermore the utility of the underlying right is  
                      not altered by an authorization to change.

A-4.9394           Water quality is an attribute of a water right that is protectable  
E-24.4879           from adverse effect. The Department may not authorize a change which  
                      results in a degradation of water quality such that other  
                      appropriators are unable to reasonably exercise their water rights.

B-5.690            Lubricating the drilling apparatus for exploratory drilling is a  
                      beneficial use of water.

B-21.780           Motion for Direct Verdict denied. Sufficient showing to proceed.  
S-21.660

E-24.4831           Department has authority to make and must make a threshold  
J-21.800            determination on the existence and extent of the water right an  
O-23.6994           applicant proposes to change. The Department may make a preliminary  
                      determination as to Applicant's ownership interest in the subject  
                      water right.

O-23.690           The buyer of property under a contract for deed can seek to change  
S-20.720            the water right. Ownership of water right transfers under a contract  
                      for deed. A contract for deed vests the entire equitable and  
                      beneficial interest of the land in the buyer.

E-22.480           A temporary preliminary decree is neither a final decree nor a final

J-21.800 immutable statement of a water right. Mont. Code Ann. § 85-2-231, et.seq. In change proceedings, a temporary preliminary decree may provide evidence of existing rights but does not dictate the Department's decision. **Cites MacDonald v. State and Hollenback.** [Final Order]

**APPEALED TO DISTRICT COURT. DNRC DECISION AFFIRMED.**

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<b>Final Order Date:</b>	12/15/92 (D)	<b>Applicant:</b>	Hollenback
<b>Case #/Type:</b>	68033-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/13/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	10/20/92	<b>Use:</b>	Irrigation

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A-16.750 Even though the statutes controlling an application are those in  
E-22.480 effect at the time the application was filed, §§ 85-2-311(1)(a) and  
L-1.940 (4) apply to the present application. Section 85-2-311(4) simply  
U-14.120 made explicit concepts that were inherent but unstated in prior  
statutory language, and § 85-2-311(1)(a) corrected a semantic  
impasse identified by the courts which virtually halted the issuance  
of new water rights. Because of their nature, they should be applied  
to applications received prior to their effective date.

A-16.7516 Applicant has shown a lack of bona fide intent to appropriate a  
B-5.690 portion of the proposed flow rate, therefore no permit can be issued  
for it.

U-14.1274 A single occurrence cannot be the basis for a finding that  
unappropriated water is reasonably available during the proposed  
period of use.

P-5.800 The Department may modify a water use permit if the permit is not  
T-5.800 being followed. Applicant failed to show, however, the condition on  
an existing permit could not be complied with or that circumstances  
had changed such that the decision of the Department with regard to  
the condition would be different now than when originally issued,  
hence, insufficient reason exists to modify the existing permit.

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<b>Final Order Date:</b>	01/05/93 (G)	<b>Applicant:</b>	Hougen/Kraft
<b>Case #/Type:</b>	G36995-ss41H (R)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/15/81	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	None	<b>Use:</b>	Irrigation

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D-21.310 Show cause hearing on whether Department's Proposal should be  
J-21.800 adopted was vacated because no party filed the required notice of  
S-21.660 intent to appear. Final Order issued adopting Proposal.

E-24.480 Regardless of actions by the Montana Water Court, authorization of a  
J-21.800 post-July 1, 1973, change must be granted or denied by the depart-  
L-1.940 ment. The statutes provide no other process for authorizing such a  
change, therefore such a change cannot be authorized by its  
appearance on a water right abstract in a Water Court decree.

J-21.800 Statute controlling severing and selling a water right was repealed  
L-1.940 in 1985; thereafter § 85-2-402 became controlling over such  
applications.

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<b>Final Order Date:</b>	01/22/93 (Remand)	<b>Applicant:</b>	United States Fish & Wildlife Service
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<b>Case #/Type:</b>	64044-s40Q (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	04/09/1987	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	None (settled)	<b>Use:</b>	Fish & Wildlife

**J-21.800** Private parties, though a privately stipulated agreement, cannot  
**T-5.800** agree to an action that binds the Department to act, if the Department is not signatory to the agreement. Only the Department has authority to place conditions on permits and it is within the Department's discretion to determine what conditions should be placed on a permit.

**J-21.800** The Department recognizes the power of the Tribes and the federal  
**T-5.800** government to enter into binding agreements and has construed the Stipulated Agreement to be such. Therefore, the Stipulated Agreement between the USFWS and the Tribes is accepted.

<b>Final Order Date:</b>	03/08/93 (G w/C)	<b>Applicant:</b>	City of Pinesdale/ Unified Industries
<b>Case #/Type:</b>	74310-s76H (P) 74311-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/23/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	11/06/91	<b>O/A Examiner:</b>	Lighthizer
<b>O/A Date:</b>	01/12/93	<b>Use:</b>	Municipal

**A-4.930** Objector alleged Applicant's proposal may be part of a cumulative  
**B-21.780** depletion effect. Applicant has no burden to disprove potential  
**L-1.940** adverse effects from other existing or possible future projects. Mechanism for pursuing issue of cumulative effects is 85-2-319, or 85-2-506 and 507.

**A-4.930** The effect of the proposed appropriation would be immeasurable and,  
**E-24.4879** hence, would not alter ability of prior appropriators to reasonably exercise their water rights. Therefore, no adverse effect. [P4D]

**A-4.930** There is no distinction in Montana law between surface and ground  
**L-1.940** water in the operation of the priority system and of adverse effect.  
**S-15.920** The only distinction between surface and ground water is our ability to understand the factual circumstances, and that is always improving.

**A-4.9321** After June of every year there is a call on the source. The  
**E-24.4879** additional stress a new appropriation would place on this already  
**U-14.1259.00** over-appropriated stream is an effect which must be considered adverse. [FO]

**A-4.9321** The subsurface supply of a stream, flowing through the bed of the  
**S-15.920** stream, is as much a part of the stream as surface flow, and is  
**T-5.800** subject to the same rules. The underflow includes water moving in lateral extensions of water bearing material in each side of the surface channel. Therefore, permit would be subject to call and to control by water commissioner.

**A-4.9394** Contention operation of the diversion system will not be adequate  
**M-5.110** because permit would be impossible to administer is not within scope of whether criterion has been met. Goes to issue of possible enforceability. Other than proving system is capable of controlling the amount of water it diverts, showing a permit can be enforced is not a criterion for issuance.

**B-5.6979** Several water rights must not be combined to appropriate more water

**S-21.760**                   than can be beneficially used. Therefore, permit must identify this  
**T-5.800**                   limitation on the supplemental nature of applicant's water rights.

**B-21.780**                   Applicant must show their proposed system can be constructed and  
**M-5.110**                   operated to divert and deliver the amount of water requested  
reasonably efficiently and without waste, and to allow control such  
that it can be regulated in accordance with the system of priority  
on the source.

**E-22.480**                   Comparing the total of claimed water rights to flows in a small  
**E-24.480**                   drainage has probative value toward determining whether  
**S-15.920**                   unappropriated water is available. [FO]  
**U-14.1259.00**

**E-22.480**                   Although diverting water without a permit is a misdemeanor and  
**J-21.800**                   criminal sanctions may apply, the penalties authorized do not  
include denial of a permit. The Department has no authority to deny  
a permit on such grounds. Furthermore, whether the diversion works  
were first operated "illegally" is not relevant to how the data from  
that operation serves to satisfy the criteria for issuance of a  
permit.

**M-5.110**                   Nothing in statute, rule, or precedent requires Department  
supervision of construction of diversion devices.

**O-23.6975**               City has authority as an incorporated municipality to secure,  
construct, and operate a water supply system for the use by its city  
or inhabitants.

**U-14.1259.00**           When water is under constant call to satisfy senior rights,  
unappropriated water is not available. [FO]

**U-14.1259.00**           In July, the source is under constant call. All water in source is  
dedicated to fulfilling existing water rights. No amount of water,  
no matter how small, is available for new appropriations. [P4D]

**APPEALED TO DISTRICT COURT BY APPLICANT. APPLICANT THEN MOVED TO  
HAVE THE CASE DISMISSED. DEPT. CONCURRED.**

<b>Final Order Date:</b>	03/19/93 (D)	<b>Applicant:</b>	Dodson
<b>Case #/Type:</b>	G(W)194810-43B (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/21/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	01/21/93	<b>Use:</b>	Domestic

**E-42.4831**               Where predecessor had initiated a new use in addition to existing  
use in 1975 and failed to apply for a Beneficial Water Use Permit.  
Held no right existed to be changed.

<b>Final Order Date:</b>	03/22/93 (Remand to Processing)	<b>Applicant:</b>	Atlantic Richfield Company
<b>Case #/Type:</b>	82956-s76G (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/18/92	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	None	<b>Use:</b>	Fish and Wildlife

**B-21.780**                   Expressions of opposition were limited to adverse effects and water  
**D-21.310**                   availability. Objector did not take advantage of opportunity to file  
**E-22.480**                   prehearing statement. Department has indicated it has no concerns

O-2.490 of its own. Therefore, it is proper to grant applicant's motion in limine. Cites Garrison, 43104-s76D, and Parker, 12893-g76GJ. [Ruling on Motion in Limine, March 5, 1993.]

B-21.780 Even though Department made a determination on water availability  
D-21.310 in the past, such a determination only forms a rebuttable  
E-22.480 presumption. Cites Zinne, 50642-s40A. Subsequent applications and  
S-21.660 objectors can bring forward evidence or arguments why a prior deter-  
U-14.1259.00 mination should not apply in the present. [Ruling on Motion for  
Summary Judgement, March 5, 1993.]

D-21.310 Even if Objector were prohibited from offering undisclosed evidence,  
E-22.480 they may still testify. Cites East Helena, 62231-g41I. [Ruling on  
O-2.490 Motion for Summary Judgement, March 5, 1993.]  
S-21.660

D-21.310 The statutes governing process emphasize opportunity for access by  
L-1.940 potentially-affected persons, including the right to be heard. Cites  
O-2.490 Ryen, P49632-41H. Applicant's motion for summary judgement denied.  
S-21.660 [Ruling on Motion for Summary Judgement, March 5, 1993.]

[OBJECTIONS WITHDRAWN]

Final Order Date:	03/31/93 (D)	Applicant:	Bemis
Case #/Type:	78964-s76H (P)	Regional Office:	Missoula
Application Date:	12/31/91	Examiner:	Lighthizer
Hearing Date:	12/17/92	Use:	Irrigation

W-1.870 Waste water loses its character when it reaches a natural channel  
and flows in that channel with regularity from year to year. It then  
becomes part of the natural flow in the channel. **Cites Popham v.  
Holoron.**

W-1.870 A flow rate of 1.62 cfs is excessive for 17 acres. Held flow rate in  
excess of 17 gpm wasteful and not a beneficial use of water.

Final Order Date:	04/21/93 (G w/C)	Applicant:	City of East Helena
Interlocutory Order:	04/23/90		
Case #/Type:	70576-41I (P)	Regional Office:	Helena
	70577-41I (P)		
Application Date:	12/12/88	Examiner:	Lighthizer
Hearing Date:	03/12/90	Use:	Municipal

U-14.1274 Where Applicant sought to appropriate groundwater without knowing  
the quantity of available groundwater.

A-4.9383 Objector contended the source was surface water. There was no  
B-21.780 evidence of record as to how much of the appropriated water was  
U-14.1259 surface water and how much was groundwater. Expert witness was  
unable to determine the amounts.

Although there may be a connection between Applicant's source and  
objector's, it must remain speculative absent data from Applicant's  
actual water use, whether the appropriation of the waters would  
adversely affect the objectors.

Interim Permits issued.



Record reopened after expiration of interim permits to hear additional evidence collected under interim permits concerning adverse effect and water availability.

**A-4.930** Mere diminution of water supply is not necessarily adverse effect to objectors. Cites **Allred**.

**S-15.920** Subsurface water in this case held not ground water within meaning of Water Use Act, as evidence shows it is part of surface water. Such water is treated as if it were the surface source to which it is tributary. Cites **Kyler, Boone, Hunt, Mikesell, Tangen Ranch, and Allred**.

**U-14.120** To fulfill § 85-2-311(1)(a), MCA, all that need be shown is that there is sufficient water in at least some years for the proposed appropriation, and that the appropriation is in fact administrable.

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<b>Final Order Date:</b>	05/20/93 (G w/C)	<b>Applicant:</b>	Kostick
<b>Case #/Type:</b>	80154-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/10/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/02/93	<b>Use:</b>	Domestic/Stock/ Lawn & Garden

**M-5.110** Applicants' intent to reconstruct a portion of Upper Ross Ditch so  
**E-22.480** it will be adequate serves as evidence the means of diversion, construction, and operation are adequate.

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<b>Final Order Date:</b>	05/20/93 (D)	<b>Applicant:</b>	Stucker
<b>Case #/Type:</b>	81412-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/09/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/30/93	<b>Use:</b>	Irrigation

**U-14.1259.00** Applicant measured water flowing in a ditch which collects water  
**U-14.1274** from other sources instead of the source to provide evidence of  
**S-15.920** water availability. Held the source must be measured.

**DENIED.**

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<b>Final Order Date:</b>	05/20/93 (D)	<b>Applicant:</b>	Tintzman
<b>Case #/Type:</b>	80175-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/22/92	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	03/26/93	<b>Use:</b>	Fish & Wildlife

**A-4.930** Prior appropriators on a stream gain right to natural flows of all  
**E-24.480** tributaries in so far as may be necessary to afford the amount of  
**S-15.920** water to which they are entitled. Cites Loyning (118 Mont.); Granite Ditch (204 Mont.); Beaverhead Canal (34 Mont.).

**A-4.9321** Where seniors would have to call for water every time they wish to divert, there is an adverse effect to seniors. Cites Ridgeway (53498); Frederick (58432); Blair (33710).

**U-14.1259.00** For period source is routinely and annually under constant call or water commissioner routinely and annually shuts off juniors, all water physically present in source is en route to satisfy seniors and is appropriated, if it would reach seniors. Hence, no unappropriated water available. Cites Unified Industries (74310); Winter Sports (70511).

**B-21.780** Prior determination by department on availability of unappropriated

D-21.310 water in source forms a presumption relative to subsequent  
E-22.480 application. Nevertheless, subsequent applicant or objectors has the  
S-21.660 right to produce evidence or arguments to prove prior determination  
U-14.1259.00 should not apply in present. Cites Zinne (50642); Atlantic Richfield  
(82956).

B-21.780 One occurrence of flow is not sufficient proof water is available to  
E-22.480 satisfy a new appropriation, and cannot be basis for finding  
U-14.1274 unappropriated water is reasonably available during proposed period  
of use. Cites Hollenback (68033); Roberts (77304).

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<b>Final Order Date:</b>	06/22/93 (D)	<b>Applicant:</b>	Schiolds
<b>Case #/Type:</b>	81391-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/31/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/22/93	<b>Use:</b>	Domestic/Fish Pond

M-5.110 Diversion works must be reasonably efficient, but there is no  
W-1.870 requirement of absolute efficiency. Held approximately 10%  
B-5.6979 efficiency not reasonable. Could not conclude water is not wasted.  
**Cites Allen v. Petrick, State exrel. Crowley v. District Court,**  
**Worden v. Alexander.**

B-5.690 Applicants not interested in stocking fish and would be unable to  
A-16.750 procure fish pond license; proposed fish pond not a beneficial use.

M-5.110 Pond not nonconsumptive. Primary reason for pond construction was to  
U-14.1259.70 recharge well. Water lost through seepage and make-up water  
necessary after prior water rights are exercised allowing level in  
pond to decline.

A-4.9321 Entire drainage under constant call after mid-July. Held no  
U-14.120 unappropriated water throughout the proposed period of use.

A-4.930 Sedimentation not an adverse effect unless sedimentation so great as  
to prevent reasonable exercise of water right.

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<b>Final Order Date:</b>	06/25/93 (G w/C)	<b>Applicant:</b>	Simmons
<b>Case #/Type:</b>	82173-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/15/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/11/93	<b>Use:</b>	Irrigation

A-16.750 Department cannot issue permit unless water is to be put to  
B-5.6934 beneficial use. Confining water to a small area to eliminate marshy  
J-21.800 area and minimize mosquito population is not a beneficial use;  
P-5.800 therefore, no permit is needed.

A-16.7567 Amendments to reduce place of use and eliminate fish and wildlife  
use do not expand the parameters of the diversion from the source  
and are, therefore, acceptable without notification of persons not  
parties to the proceedings.

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<b>Final Order Date:</b>	07/16/93 (D)	<b>Applicant:</b>	Martin/Ewing
<b>Case #/Type:</b>	81855-s41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/29/92	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/21/93	<b>Use:</b>	Fish & Wildlife Fire Protection

B-5.690 Fire protection is a beneficial use. Cites 32798-s76G by Harpole;  
39887-s76D by West Kootenai.

**B-5.690** To be beneficial, use must benefit appropriator, other persons or  
**B-5.6934** public. Applicants failed to prove proposed use for wildlife would  
**B-21.780** benefit themselves, other persons, or the public. Therefore, as to  
wildlife, the criterion was not met.

**B-5.6979** Applicants must prove amount of water is not wasteful. Applicants  
**B-21.780** did not establish amount requested is reasonable and does not  
constitute waste. Therefore, as to fire protection, criterion was  
not met.

**E-22.480** Estimates of flow cannot be considered credible or substantial  
**S-15.920** enough to find estimated flow equals the actual flow. In light of  
**U-14.1274** evidence of chronic shortages in source, and without substantial  
credible evidence showing with specificity that water is available,  
the criterion is not met. Cites 68033-s76G by Hollenback; 77304-s40C  
by Roberts; 80175-s76H by Tintzman.

**E-22.480** Applicants' theory about return of seepage is feasible, but not to a  
**U-14.1259.70** lack of substantial credible evidence it cannot be concluded seepage  
**W-1.870** would return to source. The proposed project must be considered  
consumptive. Applicants did not prove unappropriated water available  
to compensate for seepage.

**U-14.1259.25** Applicants proved the project, by recovering water lost to  
**U-14.1274** transpiration, offset the effects of evaporation. Thus,  
**W-1.870** unappropriated water is available for portion of consumptivity  
attributable to evaporation.

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<b>Final Order Date:</b>	07/27/93 (D)	<b>Applicant:</b>	Blackburn/Theodor
<b>Case #/Type:</b>	80590-s42K (P)	<b>Regional Office:</b>	Miles City
<b>Application Date:</b>	03/05/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/25/93	<b>Use:</b>	Fish and Wildlife

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**E-24.4894** An owner of a right to use water may collect and recapture it before  
**U-14.1259** it leaves his possession. Irrigation company cleaned ditch which  
**W-1.870** stopped flow through wetland area that Applicants sought to  
appropriate. Flow is captured in a drain ditch and routed to  
irrigation company's canal for reuse. **Cites Ide and Rock Creek Ditch  
and Flume Co.**

**O-2.490** A person has standing to file an objection if the property, water  
**S-20.110** rights, or interests of the objector would be adversely affected by  
the proposed appropriation. Mont. Code Ann. § 85-2-308(3). As  
members of the irrigation company, the objectors' property and  
interests could have been adversely affected by the proposed  
project.

**A-16.750** The application was for surface water; but no surface now entering  
**S-15.920** pond. Groundwater may be entering pond, but application not for  
**U-14.120** for groundwater use. Applicants have not proven water available in  
the actual source of supply. [FO]

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<b>Final Order Date:</b>	08/13/93 (G w/C)	<b>Applicant:</b>	Larson Creek Water Users Association
<b>Case #/Type:</b>	G(W) 43186-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/14/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/03/93	<b>Use:</b>	Irrigation

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**E-24.4831** Department has authority to make and must make threshold deter-

J-21.800 mination on existence and extent of water right applicant proposes to change. **Cites Bozeman and Lichtenberg, Bladholm, T-L Irrigation, and Combs.**

E-24.4810  
E-24.4831  
E-22.480 Aside from allegations of abandonment, objectors did not provide evidence of abandonment. Applicant provided exhibits confirming water right in use large part of time since use was established. Applicant's underlying water right accepted as claimed.

B-5.690  
U-14.120 Whether sufficient unappropriated water for applicant's intended intended purposes immaterial. Department will not make economic decisions for applicant. **Cites Monforton; Pettapiece.**

E-24.480 There is nothing in decree to prevent changing means of conveyance as long as no change in point of diversion, place of use, place of storage, or purpose of use.

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<b>Final Order Date:</b>	08/16/93 (D)	<b>Applicant:</b>	K. Hanson
<b>Case #/Type:</b>	81705-g76F (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/15/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/17/93	<b>Use:</b>	Irrigation/Stock

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U-14.120 To comply with § 85-2-311(1)(a), MCA, applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator.

A-4.9383  
L-1.940  
S-15.920 There is no distinction in Montana between surface water and ground water in the operation of law. The only distinction is our ability to understand the factual circumstances which are improving with the development of increasingly sophisticated data collection techniques and with the amount of data collected.

A-4.930  
E-24.480  
S-15.920 Prior appropriators of waters of a stream gain the right to natural flows of all tributaries in so far as the flows are necessary for their entitlements.

A-4.930  
E-24.480  
S-15.920 Feeder springs that naturally form a part of the flows of a stream belong to that stream as a part of its source of supply.

A-4.930  
A-4.9383  
S-15.920 The waters of a tributary may not be diverted to the injury of prior appropriators. The groundwater flowing at the proposed point of diversion has been specifically established as tributary to the surface flows relied upon by prior appropriators, therefore it may not be diverted to their injury.

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<b>Final Order Date:</b>	09/08/93 (D)	<b>Applicant:</b>	Pitsch
<b>Case #/Type:</b>	80761-s40A (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/20/92	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/08/93	<b>Use:</b>	Irrigation

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A-16.750  
L-1.940  
S-21.6621 A decision under the Water Use Act is not a resolution of a controversy between litigants over a claim or demand; it determines whether a person receives an entitlement. Any person may apply for a permit. A single decision in the permitting process on one application cannot stop future applications from being filed on the same source.

**L-1.940** Through the basin closure mechanism, the Water Use Act provides for  
**S-21.6621** finality and for protection against repeated determinations of  
settled issues.

**A-16.750** An applicant in a second application must show something is new or  
**S-21.6621** different about the circumstances accompanying the second  
application.

**A-4.9394** An applicant is required to prove the criteria in (1)(g) through (i)  
**E-14.930** only if a valid objection is filed. A valid objection must contain  
**O-2.490** substantial credible information establishing said criteria may not  
be met. For (1)(h), only DHES or a local water quality district may  
file a valid objection. No such valid objections were filed  
therefore, applicant not required to prove criteria in (1)(h) and  
(I).

**E-22.480** Evidence provided by applicant not substantial enough to overcome  
**U-14.120** collective, uncontradicted testimony of objectors. Therefore, it  
cannot be concluded unappropriated water is available. Cites 77304-  
s40C by Roberts.

**B-21.780** Evidence provided in this case and in the previous case enough  
**E-22.480** substance and precision to conclude there is a preponderance  
**U-14.120** supporting a conclusion unappropriated water is or is not available;  
311(1)(a) not met.

**APPEALED TO DISTRICT COURT.**

<b>Final Order Date:</b>	12/08/93 (G w/C)	<b>Applicant:</b>	Leatzow
<b>Case #/Type:</b>	75070-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	07/02/90	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	08/06/91	<b>Use:</b>	Domestic and Stock

**A-4.9348.00** Objector alleged Applicant's proposal may be part of a cumulative  
**A-4.9383** depletion effect. Applicant has no burden to disprove potential  
**A-4.9392** adverse effects for possible future projects, or to disprove  
**B-21.780** speculative allegations. The laws providing a mechanism for pursuing  
**L-1.940** issue of cumulative effects are §§ 85-2-319, or 85-2-506 or 507,  
MCA.

**E-22.480** Although diverting water without a permit is a misdemeanor and  
**J-21.800** criminal sanctions may apply, the penalties authorized do not  
include denial of a permit. The Department has no authority to deny  
a permit on such grounds. Furthermore, whether the diversion works  
were first operated "illegally" is not relevant to how the data from  
that operation serves to satisfy the criteria for issuance of a  
permit.

**J-21.800** State has jurisdiction to grant permit to appropriate excess waters  
on Flathead Reservation.

<b>Final Order Date:</b>	03/30/94 (G w/C)	<b>Applicant:</b>	Wyrick
<b>Case #/Type:</b>	80600-s42M (P)	<b>Regional Office:</b>	Miles City
	G(P)036242-42M (C)		
<b>Application Date:</b>	02/24/92 (P)	<b>Examiner:</b>	Stults
	06/03/92 (C)		
<b>Hearing Date:</b>	06/08/93	<b>Use:</b>	Irrigation

**J-21.800** Only the Department has authority to place conditions on permits and

**T-5.800** change authorizations, and so long as conditions are necessary to meet the statutory criteria it is within the Department's discretion to determine what conditions should be placed on a permit or change authorization.

**E-22.480** Although diverting water without a permit is a misdemeanor and  
**J-21.800** criminal sanctions may apply, the penalties authorized do not include denial of a permit. The Department has no authority to deny a permit on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of a permit.

**B-21.780** Test for availability of unappropriated water consists of proving  
**U-14.1259.00** the physical presence of water at the intended point of diversion in  
**U-14.1274** the amount applied for at the times it is proposed to be put to use.  
**E-24.480** **Cites 70511 by Winter Sports; 63997 by Crisafulli;** and Department Summary Report: Clark Fork Basin Water Use (1990). In addition, water physically present must not be under control of and destined to use of prior appropriator. **Cites 80175 by Tintzman and 69739 by McDonald.**

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<b>Final Order Date:</b>	04/12/94 (G w/C)	<b>Applicant:</b>	Bemis
<b>Case #/Type:</b>	84560-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/07/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	02/28/94	<b>Use:</b>	Irrigation/Stock

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**B-5.6979** Applicants' intent is to divert and use water for irrigation in the same manner and on the same acreage with no intention of using more water than claimed by statement of claim filed with Water Court. Permit must be conditioned so that the combined appropriation cannot exceed the claimed amount.

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<b>Final Order Date:</b>	05/12/94 (G w/C)	<b>Applicant:</b>	Anaconda-Deer Lodge
<b>Case #/Type:</b>	72455-s76G (P) G(W)017056-76G (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/29/90 (P) 04/01/93 (C)	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/04/94	<b>Use:</b>	Commercial

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**B-21.780** Upon Applicant's discharge of the burden to produce a preponderance  
**O-2.490** of evidence by submitting hydrologic evidence and other data on the  
**A-4.9395** issue of adverse effect, objectors must show they have water rights, describe the operation of their rights, state how the proposed use will change the conditions of water occurrence in the source of supply or how it will otherwise affect their rights, and why they will not be able to reasonably exercise their water right under the changed condition. **Cites Houston.** Here objectors offered no evidence to substantiate or establish a claim of adverse effect related to the proposed project.

**O-23.6975** City has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use by its city or inhabitants.

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<b>Final Order Date:</b>	05/17/94 (G w/C)	<b>Applicant:</b>	McMaster
<b>Case #/Type:</b>	83761-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/21/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	No Hearing	<b>Use:</b>	Domestic

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J-21.800 State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation.

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<b>Final Order Date:</b>	06/16/94 (G w/C)	<b>Applicant:</b>	di Stefano
<b>Case #/Type:</b>	82374-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/26/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/12/94	<b>Use:</b>	Domestic

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B-21.780 Objector alleged Applicant's proposal may be part of cumulative depletion effect. Applicant has no burden to disprove potential adverse effects for possible future projects.

U-14.1259.00 Entire volume of dead storage physically and legally available to  
U-14.1274 Applicants since Objector's diversion is above dead storage water level.

M-5.110 Whether Objector's means of diversion is reasonable is arguable  
O-2.490 since courts in Montana and other jurisdictions have found that a means of diversion which requires appropriator to command whole of source merely to facilitate diversion of a portion of the entire flow and volume to which their senior appropriation entitles them is not reasonable means of diversion.

E-24.4879 Senior has no right to prevent changes by later appropriators in condition of water occurrence, such as increase or decrease of stream flow or lowering of water table, artesian pressure, or water level, if prior appropriator can reasonably exercise water right under changed conditions.

J-21.800 State has jurisdiction to grant permit to appropriate excess waters on Flathead Reservation.

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<b>Final Order Date:</b>	06/16/94 (G w/C)	<b>Applicant:</b>	Richards
<b>Case #/Type:</b>	86507-s41C (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/08/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/19/94	<b>Use:</b>	Fish Pond

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U-14.1259.70 Because use is primarily nonconsumptive, proof that sufficient water physically present at point of diversion fulfills § 85-2-311(a). Consumptive use (filling the pond) must be accomplished during high spring runoff.

S-21.6621 Although record shows source over-appropriated, use is primarily  
U-14.1259.70 nonconsumptive and there are unappropriated waters for nonconsumptive use.

A-4.930 "Opening floodgates" argument that future similar appropriations will threaten prior appropriators not relevant. Future appropriators must also get permit.

J-21.800 Department has authority to condition permits provided such  
T-5.800 conditions are necessary to satisfy criteria listed Mont. Code  
S-20.720 § 85-2-311. Here Applicant proposes to fill pond initially from  
S-15.920 Wisconsin Creek, a consumptive use in partially closed basin where MDFWP has reservation. To prevent adverse effect and unreasonable interference with reservation and comply with Mont. Code Ann. § 85-2-341 (1993), pond can only be filled during high spring runoff periods and permit must be so conditioned.

<b>Final Order Date:</b>	07/18/94 (G w/C)	<b>Applicant:</b>	Landfall
<b>Interlocutory Order:</b>	08/07/92		
<b>Case #/Type:</b>	G(C)010517-76LJ ©	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/20/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/15/92	<b>Use:</b>	Multiple Domestic

**A-4.9383**      Although there may be a connection between Applicant's source and  
**B-21.780**      Objectors' source, it must remain speculative, without data from a  
**U-14.1259**      properly conducted aquifer test. Distance of a well from another  
well not a factor in determining adverse effect by one well on the  
other in a fractured aquifer, rather whether specific well is  
located in the same fracture set as pumping well. Interlocutory  
Order for Applicant to conduct an aquifer test.

**B-21.780**      Upon Applicant's discharge of burden to produce substantial credible  
**A-4.9395**      evidence on issue of adverse effect, Objectors must go forward by  
producing certain information that is particularly, and sometimes  
exclusively, within their power to produce. Here Objectors produced  
no evidence other than their testimony.

**J-21.800**      The Department has authority to place conditions on authorizations  
**T-5.800**      to change provided such conditions are necessary to satisfy the  
criteria. Here Applicant proposes to construct third well in  
fractured bedrock aquifer. Evidence shows wells must be in same  
fracture system for effect to be observed. Therefore, authorization  
to change must be conditioned so that when third well is completed,  
Applicant must notify Objectors before bringing new well on line so  
Objectors can observe static water levels in their wells prior to  
pumping new well and may then periodically observe static water  
level to determine whether water level is declining sufficiently to  
cause adverse effect.

<b>Final Order Date:</b>	07/26/94 (D)	<b>Applicant:</b>	Anderson Ranch
<b>Case #/Type:</b>	G(W)001422-41QJ	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/17/89	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	09/16/93	<b>Use:</b>	Irrigation

**E-24.4831**      The Department has the authority to make administrative  
determinations of the scope and parameters of an underlying water  
right to the extent necessary to fulfill its statutory duties of  
deciding if criteria of 85-2-402 have been met.

**B-21.780**      In conjunction with the requirement that the underlying water right  
**E-24.4831**      must be shown to exist before it can be changed, applicant must be  
shown to exist before it can be changed, applicant must also show  
the extent and pattern of the past use of water, i.e., its historic  
use, to ensure that the use is not being enlarged under the guise of  
a change.

**A-4.9348.00**      An increased use of water is a new appropriation and cannot be  
**A-4.9348.10**      not be allowed under the guise of a change application.

**A-4.9373**      Without evidence system will not divert more water than was diverted  
**A-4.9348.48**      historically, and Applicant's intent to continue irrigation of  
**E-24.480**      historic place of use, Department unable to authorize change so that  
**E-22.480**      new place of use may be expanded beyond bounds of historic place of  
**B-21.780**      use.



<b>Final Order Date:</b>	09/22/94 (G w/C)	<b>Applicant:</b>	Bitterroot Native Growers
<b>Case #/Type:</b>	88365-g76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/26/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/07/94	<b>Use:</b>	Irrigation

E-22.480 If an appropriator can make beneficial use of intended appropriation  
S-15.690 without adversely affecting senior appropriators, and can meet the  
A-4.930 relevant criteria, appropriator not bound to use water from  
alternate source.

**APPEALED TO DISTRICT COURT.**

<b>Final Order Date:</b>	10/05/94 (G)	<b>Applicant:</b>	Ryen
<b>Case #/Type:</b>	P049632-41H (E)	<b>Regional Office:</b>	Bozeman
	G(W)120401-41H		
	G(W)120403-41H		
<b>Application Date:</b>	11/22/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/19/94	<b>Use:</b>	Hydropower

E-22.2480 Evidence of work done on a project after completion deadline but  
P-5.8031 during temporary extension of Department jurisdiction for purposes  
of determination of whether extension should be granted, admissible.

P-5.8031 Due diligence can be exercised by party other than applicant.

P-5.8031 Permittee's lessee has been active in legal, administrative and  
engineering aspects of project, clearly showing good faith and due  
diligence.

<b>Final Order Date:</b>	10/28/94 (D)	<b>Applicant:</b>	Pope/Justice
<b>Case #/Type:</b>	87074-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	08/11/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/08/94	<b>Use:</b>	Fish & Wildlife

B-21.780 Since applicant is required to show by substantial credible evidence  
D-21.310 that all criteria have been met and applicant failed to show 311(a)  
S-21.660 and (b) had been met, no finding is necessary on other criteria.

<b>Final Order Date:</b>	11/02/94 (G w/C)	<b>Applicant:</b>	McAlpin
<b>Case #/Type:</b>	81523-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	05/19/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/12/94	<b>Use:</b>	Irrigation

E-22.4879 Although a shallow well is an adequate means of diversion, it is not  
M-5.110 a protectable one. An appropriator may not prevent new  
appropriations where he can reasonably exercise his water right  
under the changed conditions. He cannot monopolize the source simply  
so he may have a convenient means of diversion.

E-24.4879 Objector's prior rights do not entitle them to prevent changes in  
the conditions of water occurrence in the source if they can  
reasonably exercise their rights after the change.

A-4.930 Bare assertion that Applicants' test pumping caused seven foot  
E-22.480 decline in static water level of Objectors' well is not sufficient  
to prove adverse effect.

<b>Final Order Date:</b>	11/18/94 (G w/C)	<b>Applicant:</b>	Wills Cattle Co/McLean
<b>Case #/Type:</b>	85184-s76F (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	03/22/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/17/94	<b>Use:</b>	Irrigation

**B-5.6979** Several water rights must not be combined to appropriate more water  
**S-21.760** than can be beneficially used. Therefore, permit must identify this  
**T-5.800** limitation on the supplemental nature of applicant's water rights.

**A-16.750** Applicant can make use of less flow than was requested; accordingly,  
**U-14.120** the amount requested is considered to include lesser flows as well.

**U-14.1259.00** To comply with Mont. Code Ann. § 85-2-311(1)(a), applicant must  
**U-14.1274** prove that, at least in some years, sufficient unreserved water will  
**A-4.9321** be physically available at the point of diversion to supply the  
amount requested throughout the period of appropriation, and that at  
least in some years, no legitimate calls for water will be made on  
him by a senior appropriator.

**A-4.9321** Since the objectors have no water rights for natural flow of drain  
**E-24.4831** ditch used by objectors to carry Vaughn Ditch water, there is  
possibility of call from Wills for natural flow; however, there is  
no way to separate natural flow from Vaughn Ditch water. Call would  
be futile.

**APPEALED TO DISTRICT COURT. COURT UPHELD DEPARTMENT'S DECISION.**

<b>Final Order Date:</b>	11/28/94 (D)	<b>Applicant:</b>	Hardy/Miller
<b>Case #/Type:</b>	85129-s76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/16/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/22/94	<b>Use:</b>	Domestic/Stock

**B-21.780** Applicants must show availability of water. Here Applicants provided  
**U-14.120** only an estimate of the flow of water while the statutes clearly  
require a preponderance of evidence in the form of hydrologic or  
other evidence such as water supply data, field reports, and other  
information developed by the applicant, department, USGS, or SCS.

**B-21.780** Applicants must show their proposed system can be constructed and  
**M-5.110** operated to divert and deliver the amount of water requested and to  
allow control of the amount of water diverted such that it can be  
regulated in accordance with the system of priority on the source.  
Here Applicants failed to show how the flow from precipitation and  
snow melt would be allowed to pass the proposed diversion.

**B-21.780** Since Applicants are required to show by a preponderance of evidence  
**D-21.310** that all criteria have been met and Applicants failed to show 311(a)  
**S-21.660** and (c) had been met, no finding necessary on other criteria.

<b>Final Order Date:</b>	12/07/94 (G w/C)	<b>Applicant:</b>	Dietz
<b>Case #/Type:</b>	88504-s76F (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/07/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/13/94	<b>Use:</b>	Fishery/Wildlife/ Waterfowl

**B-21.310** Objections withdrawn at hearing. However, Applicant is not relieved  
**O-2.490** of duty to present evidence to satisfy substantive burden of proof  
when all parties withdraw their objections.

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<b>Final Order Date:</b>	01/24/95 (D)	<b>Applicant:</b>	Blakely
<b>Case #/Type:</b>	G(W)046021-41H (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	03/25/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	10/25/94	<b>Use:</b>	Irrigation

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**B-21.780**            Applicant must show proposed system can be constructed and  
**M-5.110**            operated to divert and deliver the amount of water requested  
reasonably efficiently and without waste. Here applicant failed to  
show how water would be transported under the railroad.

**A-4.930**            Applicant must show there will be no adverse effect to the water  
**B-21.780**            rights of other persons. Since other ditch users are now using an  
alternate system, applicant failed to demonstrate that her ditch use  
would not cause further adverse effect.

**B-21.780**            Since applicant is required to show by substantial credible evidence  
**D-21.310**            all criteria have been met and applicant failed to show 402(a)  
**S-21.660**            and (b) had been met, no finding is necessary on other criteria.

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<b>Final Order Date:</b>	02/28/95 (G w/C)	<b>Applicant:</b>	USA, Dept of Interior, BLM
<b>Case #/Type:</b>	86859-s40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	04/04/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/29/94	<b>Use:</b>	Stock/Waterfowl/ Wildlife

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**B-21.780**            An applicant is not relieved of the duty to present evidence to  
**O-2.490**            satisfy applicant's substantive burden of proof when all parties  
withdraw their objections.

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<b>Final Order Date:</b>	04/13/95 (D)	<b>Applicant:</b>	Schrader
<b>Case #/Type:</b>	89459-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/28/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	02/14/95	<b>Use:</b>	Domestic/Irrigation

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**S-15.920**            Even though the tributary does not flow into North Woodchuck Creek  
**A-4.930**            on the surface, it contributes to flow of the stream with subsurface  
flow. Interruption of said flow would reduce the amount of water  
available for prior rights in an already water-short stream, causing  
an adverse effect.

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<b>Final Order Date:</b>	04/13/95 (G w/C)	<b>Applicant:</b>	Vermedahl
<b>Case #/Type:</b>	G(W)024095-76L (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/15/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/09/94	<b>Use:</b>	Irrigation

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**A-16.7576**            Even though there was error in the notice, Objectors can't complain.  
**O-2.490**            They had actual knowledge of place of use which constitutes notice.  
Objectors waited too long to make objection. By waiting until the  
hearing to voice concerns, objectors foreclosed the Department's  
ability to correct error. Requests for continuance based on lack of  
proper notice made less than 10 days prior to hearing can only be  
granted upon showing that reason for request could not have been  
ascertained earlier. Mont. Admin. R. 36.12.222(3) 1994. As part of  
defective notice objection, objectors also point to errors in  
applicant's claims of existing rights, in particular, an apparent  
scrivener's error. Erroneous or inflated claims for existing rights  
in adjudication do not constitute defective notice in Department's  
change authorization proceedings.

**A-4.9348.20** Record shows only 20 acres were irrigated instead of the 80 claimed by applicant. Historic use cannot be expanded by change in place of use.

**J-21.800**  
**E-24.4831** Department has authority to make preliminary administrative determinations of scope and parameters of underlying right to extent necessary to fulfill its statutory duties of deciding if criteria in 85-2-402 have been met.

**E-22.480**  
**J-21.800** Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an Authorization to Change. The Department has no authority to deny an Authorization on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how the data from that operation serves to satisfy the criteria for issuance of an Authorization.

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<b>Final Order Date:</b>	04/18/95 (G w/C)	<b>Applicant:</b>	Kingsbury Ditch Co.
<b>Case #/Type:</b>	G(W)199792 (C)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	01/23/76	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	N/A	<b>Use:</b>	Irrigation

**B-21.780**  
**O-2.490** An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

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<b>Final Order Date:</b>	04/27/95 (G w/C)	<b>Applicant:</b>	Polson Ready Mix Concrete Inc.
<b>Case #/Type:</b>	79387-g76LJ (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	11/27/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/08/93	<b>Use:</b>	Industrial

**E-24.4831** A certificate of water right for a well with a flow rate of less than 100 gpm (now 35 gpm) must be filed after the water has been put to beneficial use. One cannot reserve water by filing Form 602 for the maximum volume one can produce with the flow rate under 85-2-306 for a ground water well. A 602 is to be filed after the fact.

**U-14.120**  
**S-15.920** Permit was granted only because Applicant is not appropriating an additional volume of water. The aquifer will not decline further as a result of this permit.

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<b>Final Order Date:</b>	06/06/95 (G w/C)	<b>Applicant:</b>	Montana DFWP
<b>Case #/Type:</b>	V(W)099722-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/14/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	03/22/95	<b>Use:</b>	Instream flow

**E-24.4810** Absent proof of intent to abandon, claimed rights treated as legitimate even if unused for a long time.

**A-4.9348**  
**A-4.9348.48**  
**E-24.4810** Where the consumptivity of water use is reduced for a period of 27 years through no fault of the appropriator who then wishes to resume same consumptivity as originally used and there is no evidence of intent to abandon the consumptive portion of the original water right, a return to the original consumptivity does not constitute an increase in burden on the source.

**A-4.9348.48** Where water right owners periodically sought to find a conveyance

E-24.4810 for water over a period of 27 years, no presumption of intent to abandon arises.

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<b>Final Order Date:</b>	06/23/95 (G w/C)	<b>Applicant:</b>	Missoula County RSID
<b>Case #/Type:</b>	90476-g76M (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/24/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/11/95	<b>Use:</b>	Municipal

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A-4.930 Objectors' wells located in tighter tertiary materials result in  
O-2.490 shortage of water before Applicant's well was completed. Applicant's well located in younger alluvial sands and gravel. Well test indicated no adverse effect.

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<b>Final Order Date:</b>	07/11/95 (D)	<b>Applicant:</b>	Stellick
<b>Case #/Type:</b>	84577-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	01/13/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/29/93	<b>OA Examiner:</b>	Stults
<b>Oral Argument Date:</b>	01/25/94	<b>Use:</b>	Fish & Wildlife

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U-14.120 Unappropriated water available only during high spring runoff. Permit limited to that period. So long as unappropriated water is available in some years, § 85-2-311(1)(a), MCA, is satisfied.

B-21.780 Applicant is required to prove criteria by preponderance of evidence, and evidence must be substantial and credible. Cites 77304-s40C by Roberts and 80761-s40A by Pitsch.

B-21.780 Absence of evidence criterion would be violated. Does not meet the required standard of proof.

B-5.6934 Applicant must provide preponderance of evidence use of water will  
B-5.690 benefit appropriator, other persons, or public, and amount of water  
B-5.6979 is reasonable for purpose, and is not wasteful. Cites 81855-s41H by Martin and Ewing, 77304-s40C by Roberts, 54694-g410 by Crumpled Horn, 50510-s76L by Meyer, and 56738-s76M by Brookside Estates.

[P4D modified by OA.]

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<b>Final Order Date:</b>	08/09/95 (G w/C)	<b>Applicant:</b>	Montana DFWP
<b>Case #/Type:</b>	V(W)122539-43B (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	11/10/93	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	01/20/95	<b>Use:</b>	Instream flow

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I-14.870 Irrigation rights may be leased by the Montana Dept. of Fish,  
B-5.6934 Wildlife and Parks and temporarily changed to instream flow to  
S-15.920 prevent dewatering of the stream and protect the fishery of that stream.

A-4.9379 Although the return flow would be less than before the lease, less  
A-4.9373 water would be diverted from the stream leaving more water in the stream for appropriation by downstream users.

A-4.9373 The consumptive use of the rights to be changed amounts to  
E-24.4831 approximately 85 percent of the amounts diverted. Therefore of the  
E-24.4834 water instream that is available for the rights to be changed, only 85 percent could be protected instream under this change application.

<b>Final Order Date:</b>	08/11/95 (D)	<b>Applicant:</b>	Nelson
<b>Case #/Type:</b>	92024-g40C (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/13/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/07/95	<b>Use:</b>	Irrigation

M-5.110            A statement that an irrigation firm would be employed so that the  
B-21.780            right equipment needed would be used does not constitute adequate  
E-22.480            means of diversion, construction and operation of the appropriation  
works.

U-14.1259.00      Pumping the source for 45 minutes at a rate lower than requested in  
U-14.1274           application does not prove legal or physical availability especially  
A-4.930            when it is not known where the water pumped from the source was  
S-15.920           discharged. Neither does it prove no adverse effect to existing  
E-22.480           water rights when existing rights were not monitored during brief  
pumping test.

<b>Final Order Date:</b>	08/30/95 (G w/C)	<b>Applicant:</b>	Schweitzer
<b>Case #/Type:</b>	88962-s41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	02/11/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/23/95	<b>Use:</b>	Fish/Wildlife

B-21.780            An applicant is not relieved of the duty to present evidence to  
O-2.490            satisfy applicant's substantive burden of proof when objectors  
default.

<b>Final Order Date:</b>	09/08/95 (D)	<b>Applicant:</b>	Wallace
<b>Case #/Type:</b>	91277-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	09/19/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/26/95	<b>Use:</b>	Fish & Wildlife

B-21.780            Since applicant is required to show by a preponderance of evidence  
D-21.310            all criteria have been met and applicant failed to show 311(c) had  
S-21.660            been met, no finding is necessary on remaining criteria.

<b>Final Order Date:</b>	09/21/95 (G w/C)	<b>Applicant:</b>	Fisher
<b>Case #/Type:</b>	90192-s76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/13/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/13/95	<b>Use:</b>	Fish/Wildlife/ Irrigation

B-21.780            An applicant is not relieved of the duty to present evidence to  
O-2.490            satisfy applicant's substantive burden of proof when objecting  
parties fail to appear and are declared in default.

<b>Final Order Date:</b>	09/21/95 (G w/C)	<b>Applicant:</b>	O'Bryan
<b>Case #/Type:</b>	80959-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	02/21/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	None	<b>Use:</b>	Fish/Wildlife/ Irrigation

B-21.780            An applicant is not relieved of the duty to present evidence to  
O-2.490            satisfy applicant's substantive burden of proof when all parties  
withdraw their objections.

<b>Final Order Date:</b>	10/04/95 (R)	<b>Applicant:</b>	Ashcraft
<b>Case #/Type:</b>	G(W)016111-41H (R)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/12/87	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/20/95	<b>Use:</b>	Irrigation

J-21.800            The Department has no jurisdiction to determine whether appropriator stands in the shoes of an "innocent purchaser."

S-15.920            Authorization to change was granted for a well to tap the shallow  
T-5.800            aquifer at a depth of 40 to 80 feet. Well completed taps a deeper  
                      aquifer at a depth of 153 feet.

<b>Final Order Date:</b>	10/25/95 (D)	<b>Applicant:</b>	Ratliff
<b>Case #/Type:</b>	91828-s43Q (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	12/05/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/18/95	<b>Use:</b>	Fish & Wildlife

M-5.110            Although diverting water without a permit is a misdemeanor and  
J-21.800            criminal sanctions may apply, the penalties do not include denial of  
E-22.480            permit. The Department has no authority to deny a permit on such  
                      grounds. Furthermore, whether the diversion was first constructed  
                      "illegally" is not relevant to how the data from that diversion  
                      served to satisfy the criteria for issuance of a permit.

U-14.1274           Because after the initial filling and topping off each spring, water  
U-14.1259.00       flows through the overflow pipe approximately every two weeks or any  
A-4.930            time Applicants irrigate, water is clearly physically available at  
O-2.490            the point of diversion. It is not clear, however, that the water has  
                      not been appropriated for use downstream by Objectors.

A-16.750           Applicants' dam was constructed before Objectors' pond. However, a  
O-23.6994           priority date is not assigned to a new water right until the date an  
P-5.800            application is filed with the Department, regardless of which  
                      reservoir was constructed first. Clearly Objectors have an earlier  
                      priority date; thus a senior right.

B-21.780           It was Applicants' burden to show that unappropriated water is  
S-15.920           available and that senior rights are not adversely affected. To do  
E-22.480           so Applicants needed to establish how much water in the drainage may  
                      be seepage from the Cove Ditch, irrigation runoff, or natural  
                      runoff, the extent of seepage out of their pond down the gully  
                      toward Objectors' pond and the extent of the evaporative losses from  
                      their pond. Absent this kind of information, the permit cannot be  
                      granted.

<b>Final Order Date:</b>	10/25/95 (D)	<b>Applicant:</b>	Laxson/Courtney
<b>Case #/Type:</b>	89309-s76LJ (P)	<b>Regional Office:</b>	Kalispell
	39310-s76LJ (P)		
<b>Application Date:</b>	04/29/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/27/95	<b>Use:</b>	Fish & Wildlife/ Stock

B-21.780           Water must be measured at the proposed point of diversion to meet  
U-14.1259.00       the statutory burden of proof set forth in 85-2-311(1)(a).  
U-14.1274  
E-22.480

A-4.9321           Having to call a stream is not an adverse effect. The appropriative  
                      system by its nature contemplates the supply may be less than

demand. First in time, first in right would never operate if no call were ever made.

<b>Final Order Date:</b>	11/14/95 (G w/C)	<b>Applicant:</b>	Binley/Gleason
<b>Case #/Type:</b>	92178-s76K (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/07/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/31/95	<b>Use:</b>	Domestic
<b>J-21.800</b>	The Department has no jurisdiction concerning easement and zoning matters. A permit issued by the Department does not grant easements. If a permittee cannot gain an easement or violates a zoning issue, the permit cannot be perfected and the Department would subsequently revoke the permit.		
<b>M-5.1129</b>			
<b>P-5.800</b>			
<b>O-23.6975</b>	Applicant need only show possessory interest in the proposed place of use.		
<b>Final Order Date:</b>	11/30/95 (G w/C)	<b>Applicant:</b>	Snapp
<b>Case #/Type:</b>	G(W)119067-41S (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	03/29/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/06/95	<b>Use:</b>	Irrigation
<b>J-21.80</b>	The Department has no jurisdiction in matters pertaining to property damage. Even if it did, there is no evidence in the record that the change will increase property damage or exacerbate the seepage problem. There will be no change in the means of diversion, the means of conveyance, the source, the flow rate, or volume of water diverted.		
<b>P-18.720</b>			
<b>M-5.110</b>			
<b>S-15.920</b>			
<b>Final Order Date:</b>	11/30/95 (REMAND)	<b>Applicant:</b>	Stevensville, Town of
<b>Case #/Type:</b>	76760-s76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/28/90	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	02/02/93	<b>Use:</b>	Municipal
<b>P-18.720</b>	Property damage or the possibility of property damage as a result of a permittee exercising its water right is not reason to deny a permit.		
<b>M-5.110</b>	It is not incumbent on an appropriator to use the most efficient means of diversion.		
<b>M-5.110</b>	Water that escapes Applicant's property is not beneficial to the Applicant and results in waste of water when it cannot be beneficially used by the neighboring property owners. If stream froze to bottom and could not be used for stock water as a result of Applicant's use, that would constitute an adverse effect to the prior water right owners.		
<b>W-1.870</b>			
<b>B-5.690</b>			
<b>A-4.930</b>			
<b>U-14.1259.00</b>	Applicant failed to meet burden to show water reasonably available in amount sought to appropriate during the period Applicant seeks to appropriate. Applicant presented no measurements of stream flow during proposed period of appropriation.		
<b>U-14.1274</b>			
<b>S-15.920</b>	Appropriator is not bound to use water from alternative source.		
<b>O-2.490</b>	An appropriator may not prevent an applicant from appropriating water simply because appropriator's headgate has been damaged by rodents and proposed appropriation will cause water to flow through, around, or under damaged headgate.		



O-2.490                   Objections settled. Applicants not relieved of duty to prove the  
B-21.780                   criteria for an authorization to change have been met. Conditions  
A-16.7567                  made to settle the objections altered the application such that  
                              application was remanded to Regional Office for amendment to reflect  
                              the changes. [Notice of Remand]

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<b>Final Order Date:</b>	01/22/96 (D)	<b>Applicant:</b>	McDonald
<b>Interlocutory Order:</b>	08/10/93		
<b>Case #/Type:</b>	69739-g76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/21/88	<b>Examiner:</b>	Stults
<b>Hearing Date:</b>	04/03/91	<b>Use:</b>	Irrigation

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A-4.9321                   Where a senior water right holder would have to call for water every  
                              time the senior wishes to divert water, there is an adverse effect  
                              to the senior. Cites Ridgeway (53498) & Frederick (58432).

A-4.9383                   Since there is a relationship between the surface flows and the  
T-5.800                    groundwater, and the project would influence surface flows, ranking  
                              in priority of the permit must be against all rights to surface  
                              water as well as the groundwater source. Cites Crisafulli (63997).

A-4.9383                   There is no distinction in Montana between surface water and ground  
L-1.940                    water in the operation of law. The only distinction is our ability  
S-15.920                  to understand the factual circumstances which is improving with the  
                              development of increasingly sophisticated data collection techniques  
                              and with the amount of data collected. [P4D on Remand]

A-4.9383                   The establishment of a tributary relationship is a question of fact.  
S-15.920                  [P4D on Remand]

A-4.930                   Prior appropriators of waters of a stream gain the right to natural  
E-24.480                  flows of all tributaries in so far as the flows are necessary for  
S-15.920                  their entitlements. [P4D on Remand]

A-4.930                   Feeder springs that naturally form a part of the flows of a stream  
E-24.480                  belong to that stream as a part of its source of supply.  
S-15.920                  [P4D on Remand]

A-4.930                   The waters of a tributary may not be diverted to the injury of prior  
A-4.9383                  appropriators. The groundwater flowing at the proposed point of  
S-15.920                  diversion has been specifically established as tributary to the  
                              surface flows relied upon by prior appropriators, therefore it may  
                              not be diverted to their injury. [P4D on Remand]

A-4.930                   If adequate means of providing sufficient supply can be made  
E-24.4879                 available to the senior, whose present adequate facilities cannot be  
U-14.120                  operated to obtain his full entitlement because of the acts of the  
                              junior, provision for such should be made at the expense of the  
                              junior, it being unreasonable to require the senior to supply such  
                              means out of his own financial resources. [P4D on Remand]

B-5.690                   A spring discharge stabilization system would not be an additional  
E-24.4879                 appropriation with a separate water right or change of an existing  
M-5.110                   water right. Such a system, however, would need to be an element  
T-5.800                   of the proposed appropriation so that it could be regulated and  
                              protected as a part of the appropriation scheme. Cites Western Water  
                              (39786) & East Bench (25170). [P4D on Remand]

E-22.480                  A report referred to in the initial hearing, but not introduced or

**R-5.930** officially noticed, appears necessary for a full understanding of this matter. To ensure the fullest understanding of this matter, the department remanded the matter for notice of the report, notice of Hildreth (71133), and evidence and argument on them.

**M-5.110**  
**T-5.800** When a relatively complex plan is necessary, and applicant does not provide that plan, the department will not unilaterally impose its own plan as a condition placed on the permit. Cites DeBruycker (58133). [P4D on Remand]

**A-4.9321**  
**E-24.480**  
**S-15.920** After flow of stream declines so it is not feasible to pump from it for irrigation even though the feeder spring is still flowing its undiminished flow, applicant could appropriate from aquifer without adversely affecting downstream users. Any call on flow of spring would be futile because flow under those circumstances is not usable by senior. [IO Order]

**P-5.8032** Applicant failed to obey terms of interim permit. Beneficial water use permit denied.

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<b>Final Order Date:</b>	01/31/96 (G w/C)	<b>Applicant:</b>	Janney
<b>Case #/Type:</b>	G(E)088756-76G (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/16/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/01/95	<b>Use:</b>	Stock

**E-24.4831**  
**E-22.480**  
**B-21.310**  
**M-5.110** There is nothing in the statutes to prevent an exempt water right owner from changing an exempt instream right to a nonexempt right by adding a ditch to convey water to a new place of use provided all the criteria for issuance of an authorization are met.

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<b>Final Order Date:</b>	05/13/96 (G)	<b>Applicant:</b>	Smith
<b>Case #/Type:</b>	G(W)194309-41D (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	4/6/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	1/10/96	<b>Use:</b>	Irrigation

**A-4.9348.20**  
**E-22.480**  
**O-2.490**  
**O-23.6994** Applicant would not adversely affect Objector's water right since she agreed to leave five miner's inches in the ditch for carriage water. Although Objector stated he needed all the water, both Applicant's and his own, to irrigate his property, he offered no evidence to substantiate that assertion. Objector's position amounts to claiming exclusive ownership of the underlying water rights. The Department's records and the record in this case indicate otherwise. Applicant owns the water right she proposes to change.

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<b>Final Order Date:</b>	06/27/96 (G)	<b>Applicant:</b>	Klemo
<b>Case #/Type:</b>	G(W)210737-41C (C)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	08/03/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	N/A	<b>Use:</b>	Irrigation

**B-21.780**  
**O-2.490** An applicant is not relieved of the duty to present evidence to satisfy applicant's substantive burden of proof when all parties withdraw their objections.

**E-22.480**  
**J-21.800** Although changing a water right without authorization is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an authorization. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1995). The Department has no statutory authority to deny a change on such grounds. Furthermore, whether the diversion works were first operated "illegally" is not

relevant to how data from that operation serves to satisfy the criteria for issuance of a permit.

<b>Final Order Date:</b>	07/12/96 (G)	<b>Applicant:</b>	Shelstad
<b>Case #/Type:</b>	86867-40J (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	03/14/94	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/30/96	<b>Use:</b>	Irrigation
<b>A-4.9394</b> <b>B-21.780</b>	Although objections relative to water quality were filed against this application, Objectors failed to provide substantial credible information establishing to the satisfaction of the Department that the criteria in subsection (1)(g), (h), or (i) as applicable may not be met; therefore their objection concerning water quality is not valid.		
<b>Final Order Date:</b>	08/27/96 (G)	<b>Applicant:</b>	O'Bryan
<b>Case #/Type:</b>	77814-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/30/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/07/96	<b>Use:</b>	Fish & Wildlife
<b>A-16.7567</b> <b>A-16.7576</b> <b>D-21.310</b>	Application may be amended after public notice if amendments would not prejudice anyone. To cause prejudice, the amendment must suggest an increase in the burden on the source.		
<b>Final Order Date:</b>	8/27/96 (D)	<b>Applicant:</b>	Pierce, Thomas
<b>Case #/Type:</b>	77814-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	5/30/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	5/7/96	<b>Use:</b>	Fish and Wildlife
<b>A-16.7567</b> <b>A-16.7576</b> <b>D-21.310</b>	Application may be amended after public notice if amendments would not prejudice anyone. To cause prejudice, the amendment must suggest an increase in the burden on the source.		
<b>Final Order Date:</b>	8/27/96 (D)	<b>Applicant:</b>	Pierce, Martin
<b>Case #/Type:</b>	80130-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	12/19/91	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	5/7/96	<b>Use:</b>	Irrigation/stock
<b>B-21.780</b> <b>A-16.750</b>	It is the applicant's burden to prove the criteria for issuance is presented. Applicant's counsel appeared at the beginning of the hearing and stated his client could not attend and that he stood on his application. Application not sufficient to meet the criteria for issuance of permit. Permit denied.		
<b>Final Order Date:</b>	10/25/96 (G)	<b>Applicant:</b>	M & W Enterprises
<b>Case #/Type:</b>	92815-41I (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/18/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/12/96	<b>Use:</b>	Commercial, irrigation and multiple domestic
<b>E-24.4879</b> <b>M-5.110</b>	Objectors' prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the changed conditions.		
<b>A-4.9395</b> <b>B-21.780</b>	Applicant who provided evidence that a lower groundwater level would not cause adverse effect to the objectors has met his burden of proof. Objectors who produced no evidence that the lower groundwater level would adversely affect them have not met their burden to go forward.		

<b>Final Order Date:</b>	10/25/96 (G)	<b>Applicant:</b>	Townview Estates
<b>Case #/Type:</b>	G(P)023312-41I (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	08/22/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	NA	<b>Use:</b>	Multiple domestic

A-4.930            The proposed change appropriating from the same source, the same  
S-20.720           amount, during the same period, will not adversely affect other  
                     water rights.

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<b>Final Order Date:</b>	11/08/96 (G)	<b>Applicant:</b>	Oswalt
<b>Case #/Type:</b>	93438-76F (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	04/13/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/04/96	<b>Use:</b>	fish, recreation, & wildlife

O-2,490            The Department not bound by covenants. Although Objectors believe  
S-15.920           the covenants of the subdivision give them all the surface rights  
E-24.4831          for the good of all the residents, they have no water rights of  
J-21,800           record on the proposed source. The water rights they do have are all  
                     upstream of the proposed pond. Held no adverse effect.

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<b>Final Order Date:</b>	11/19/96 (D)	<b>Applicant:</b>	Foss
<b>Case #/Type:</b>	95828-76D (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	11/01/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	09/10/96	<b>Use:</b>	fish pond

B-21.780           Applicants must show availability of water. Here, having no measure-  
U-14.120           ments, Applicants relied on the Orsborn method which results in mean  
E-22.480           monthly estimates. Subtracting the water use on the source according  
                     to Dept records, showed no water available during August, September,  
                     and October.

B-5.690            Applicants applied for 50 gpm because expert advised them to keep  
B-5.6979           water in delivery pipe from freezing, that was necessary. There is  
                     no need for 50 gpm in the warmer months, and application showed a  
                     need of 11.5 gpm. If permit had been approved, flow rate would have  
                     been 11.5 gpm from May to October and 50 gpm from November to April.

B-21.780           Since Applicants are required to show by a preponderance of evidence  
D-21.310           all criteria have been met and Applicants failed to show water  
S-21.660           availability, no finding is necessary on other criteria.

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<b>Final Order Date:</b>	2/11/97 (G)	<b>Applicant:</b>	Fehsenfeld
<b>Case #/Type:</b>	83286-41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/13/92	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	NA	<b>Use:</b>	Irrigation and stock

B-21.780           An applicant is not relieved of the duty to present evidence to  
O-2.490           satisfy applicant's substantive burden of proof when all parties  
                     withdraw their objections.

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<b>Final Order Date:</b>	02/27/97 (G)	<b>Applicant:</b>	Hughes
<b>Case #/Type:</b>	98096-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/24/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	12/05/96	<b>Use:</b>	Fishery

S-15.920            Source is 5 developed springs which flow into existing ditch. Water  
A-4.9325           would flow through ponds and back into ditch with little or no

A-4.930 delay. No users between the intake and outlet. No loss to seepage.  
W-1.870 Loss to evaporation is less than or equal to evapotranspiration  
M-5.110 from vegetation that now grows in proposed pond site. There can be  
no adverse effect.

O-2.490 Objectors would have Applicants install measuring device in  
Bunkhouse Creek. Applicants not diverting from Bunkhouse Creek and  
therefore are not required to install such measuring device.

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<b>Final Order Date:</b>	03/10/97	<b>Applicant:</b>	Guyette
<b>Case #/Type:</b>	93752-41F (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	05/10/95	<b>Examiner:</b>	Lighthi0zer
<b>Hearing Date:</b>	NA	<b>Use:</b>	Irrigation and stock

A-4.930 To prevent adverse effect, Applicant proposes to construct a new  
O-2.490 ditch with a dividing box to measure and direct the flow of water to  
E-24.4879 Objector's ditch providing the claimed amount of 60 miner's inches  
when Objector needs it. Held, no adverse effect.

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<b>Final Order Date:</b>	06/06/97 (D)	<b>Applicant:</b>	Gochanour
<b>Case #/Type:</b>	G(W)032359 (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/22/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	10/24/96	<b>Use:</b>	Irrigation

A-4.930 Water had not been used on acres designated to be taken out of  
A-4.9397 irrigation for approximately 89 years and had not been used for any  
B-21.780 purpose for 31 years. From 1907 to 1996, water had been used for  
E-22.480 mining. During period of nonuse, other appropriators had been able  
to use water rights with later priority dates. If applicants began  
using water now, those appropriators could be adversely affected.  
Since it is applicants' burden to provide a preponderance of  
evidence there would be no adverse effect, applicants have failed to  
meet their burden of proof.

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<b>Final Order Date:</b>	6/06/97 (G)	<b>Applicant:</b>	Martin
<b>Case #/Type:</b>	93433-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	4/11/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	None	<b>Use:</b>	Commercial/irrigation/ Domestic

B-21.780 Applicants are not relieved of the duty to present evidence to  
E-22.480 satisfy their substantive burden of proof when objections have been  
withdrawn.

S-20.110 The Department is not required to consider exceptions from  
S-21.600 parties that are not adversely affected by a proposal for decision.  
ARM 36.12.229(1). Because the Department will be adopting the  
Proposal as written, Applicant will not be adversely affected and  
the Exceptions are moot. [FO]

J-21.800 It is proper for Department to make water use determinations.  
E-22.480 Department must evaluate water use information as part of adverse  
A-16.750 effect and water availability determinations that must be before a  
A-4.930 permit can issue. [FO]  
U-14.1274

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<b>Final Order Date:</b>	08/08/97 (G)	<b>Applicant:</b>	Taylor
<b>Case #/Type:</b>	98469-76H (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	07/15/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/01/97	<b>Use:</b>	Irrigation

A-4.930            Objector has no water right in the source of supply except an exempt  
O-2.490            right for 0.68 acre-foot of stock water. Held no adverse effect.  
S-15.920           Permit granted.

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<b>Final Order Date:</b>	9/3/97 (G)	<b>Applicant:</b>	Van Dyke
<b>Case #/Type:</b>	P59786-41H (R)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/30/97	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	4/18/97	<b>Use:</b>	Irrigation

E-22.480           Obtaining a bid for completion of a well and seeding the place of  
use with grass is evidence of diligence in perfecting the permit.

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<b>Final Order Date:</b>	9/05/97 (G)	<b>Applicant:</b>	Holland
<b>Case #/Type:</b>	G(W)110835-76N (M)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	N/A	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	5/10/96	<b>Use:</b>	Irrigation

T-5.800            The Department may propose a condition on an authorization to  
A-4.930            change to limit amount of water withdrawn to avoid adverse effect.  
S-15.920           To ensure appropriator is in compliance, a second condition may be  
P-5.800            proposed to require measuring devices. A stay of one year was  
granted for appropriator to gather information to establish other  
water users would not be adversely affected. Appropriator did not  
establish no adverse effect. Authorization modified.

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<b>Final Order Date:</b>	10/27/97 (Gw/C)	<b>Applicant:</b>	Williams
<b>Case #/Type:</b>	41I-098917(P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	10/8/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/26/97	<b>Use:</b>	Irrigation

A-4.930            Since irrigation wells were installed the surface water and shallow  
A-4.9383           subsurface water has diminished. Held, the cause is most likely the  
M-5.110            cessation of flood irrigation on hundreds of acres in the area  
rather than direct reduction as a result of wells in the area. Held  
no adverse effect.

A-4.930            Lowering of the static water level in Objector's well is not, in  
E-24.4879           itself, an adverse effect. Neither can the obstruction in the casing  
O-2.490            in the well be the basis for limiting the development of the aquifer  
S-15.92            aquifer.

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<b>Final Order Date:</b>	10/27/97 (D)	<b>Applicant:</b>	Bargfrede
<b>Case #/Type:</b>	G(W)118417-76H (C)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	7/26/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	7/16/97	<b>Use:</b>	Irrigation

A-4.9348.00       Change applicant has the initial burden to show the proposed change  
B-21.780           will not increase the burden on the source and thereby will not  
E-22.480           cause an adverse effect. Here applicant failed to provide evidence  
of no adverse effect.

M-5.110            Applicant must show proposed means of diversion, construction, and  
B-21.780           operation of the appropriation works are adequate. Applicant failed

E-22.480 to show adequate means of conveyance and operation.

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<b>Final Order Date:</b>	11/12/97 (Gw/C)	<b>Applicant:</b>	Thomson
<b>Case #/Type:</b>	97905-41H (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	5/10/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	3/26/97	<b>Use:</b>	Fish & wildlife

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A-16.750 Application set point of diversion at a point on what applicant  
S-15.920 described as a newly constructed channel for McDonald Creek.  
M-5.110 However, channel did not exist on date application was filed. New  
channel deemed a component of the appropriation to carry water from  
McDonald Creek to ponds for beneficial use.

W-1.870 New channel was not lined and water would be lost to seepage which  
M-5.110 is forbidden in the Upper Missouri Basin closure. There can be no  
L-1.940 consumptive surface water use. Applicant must line channel and  
ditches. Evaporation losses must be replaced with ground water.

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<b>Final Order Date:</b>	12/19/97 (Gw/C)	<b>Applicant:</b>	Hoovestall
<b>Case #/Type:</b>	41I-095584(P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	6/30/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	9/30/97	<b>Use:</b>	Multiple domestic

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M-5.110 Wells, diversion works, and operation of the water system would meet  
all Public Water Supply regulations and specifications required by  
law. Held means of diversion, construction, and operation of the  
appropriation adequate.

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<b>Final Order Date:</b>	1/15/98 (Gw/C)	<b>Applicant:</b>	McDowell
<b>Case #/Type:</b>	43D-G011185(C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	7/11/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	7/1/97	<b>Use:</b>	Irrigation

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A-16.7521 Applicant met initial burden by submitting a correct and complete  
O-2.490 application. Information supplied by Applicant and reviewed by  
B-21.780 Department which determined, with respect to information provided,  
E-22.480 criteria were met. After objections Applicant is required to provide  
additional information to overcome objections.

M-5.1129 Applicant proposed to move point of diversion from a pump site on  
J-21.800 on the source to the existing point of diversion of Orchard Ditch.  
A-4.930 Ditch company has no water rights, but sells shares to those who  
wish to use it as conveyance. Whether Applicant has or can get a  
ditch right must be determined in a different forum. Department has  
no jurisdiction concerning ditch rights. There are no existing  
rights between the old and new points of diversion. No additional  
water would be appropriated. Held no adverse effect.

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<b>Final Order Date:</b>	2/23/98 (Gw/C)	<b>Applicant:</b>	Ridgeway
<b>Case #/Type:</b>	41S-G002909(C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/19/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	10/14/97	<b>Use:</b>	Irrigation

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S-20.720 Where a change was filed to add a place of storage to several water  
E-24-4831 rights. The periods of use of each water right do not change nor  
does the flow rate and volume. Each water right is limited to the  
original appropriation.

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<b>Final Order Date:</b>	NA	<b>Applicant:</b>	Howard
<b>Case #/Type:</b>	G(W)150892-76H (C)	<b>Regional Office:</b>	Missoula
	G(W)151192-76H (C)		
<b>Application Date:</b>	01/06/94	<b>Examiner:</b>	Lighthizer
	05/01/94		
<b>Hearing Date:</b>	10/06/95	<b>Use:</b>	Irrigation

J-21.800            The Department may grant a change authorization when applicant shows  
O-23.6994            prima facie evidence of owning the water right. If Water Court later  
E-22.480            later determines applicant does not own the water right, any  
                         authorization to change would be void.

W-1.870            When water turned into ditch may not reach the place of use, the use  
B-5.690            is not beneficial and water is wasted.

Proposal for Decision recommended denying the change. Parties settled and contested case dismissed. Final Order not issued. Change authorization issued with conditions.

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<b>Final Order Date:</b>	4/14/98 (GwC)	<b>Applicant:</b>	Wilder Resort Inc
<b>Case #/Type:</b>	76G-097326(P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	01/09/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	12/17/98	<b>Use:</b>	Commercial

E-22.480            Although diverting water without a permit is a misdemeanor and  
J-21.800            criminal sanctions may apply, the penalties authorized do not  
                         include denial of a permit. The Department has no authority to deny  
                         a permit on such grounds. Furthermore, whether the diversion works  
                         were first operated "illegally" is not relevant to how the data from  
                         that operation serves to satisfy the criteria for issuance of a  
                         permit.

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<b>Final Order Date:</b>	12/09/98 (G w/c)	<b>Applicant:</b>	Polson
<b>Case #/Type:</b>	76LJ-099791(P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/09/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/29/98	<b>Use:</b>	Municipal

T-5.800            The Department may condition any permit or authorization as long as  
A-4.9395            the condition or limitation serves to meet the criteria for  
                         issuance. Here, static water measurements go to the issue of  
                         adverse effect. However, requiring permittee to make the static  
                         water level measurements available for inspection and copying at  
                         City Hall does not serve to meet the criteria for issuance and  
                         cannot be required as a condition of the permit.

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<b>Final Order Date:</b>	06/23/99 (G W/C)	<b>Applicant:</b>	Palisades Ranch
<b>Case #/Type:</b>	43G-G(W)111421(G)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	11/13/95	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	02/25/99	<b>Use:</b>	Irrigation

A-4.9348.48            Although the proposed change would not return flow to Objecter's  
A-4.9379            first point of diversion, held no adverse effect because Applicant  
                         would be irrigating only 8 acres compared to previously irrigated 16  
                         acres thereby appropriating less water than before. Also the period  
                         of diversion would be shortened by the reduction of acreage.



<b>Final Order Date:</b>	1/3/2000 (Revoked)	<b>Applicant:</b>	Blakely Farms
<b>Case #/Type:</b>	41F-P007504 (SC)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/30/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	12/16/99	<b>Use:</b>	Irrigation

**S-21.6625** The appropriator did not appear for the hearing. Default may occur when an appropriator does not appear at a properly noticed hearing. Mont. Admin. R. 36.12.208 (1999) Discretion to revoke was invoked; the findings of fact and conclusions of law contained in the hearing notice were adopted.

<b>Final Order Date:</b>	06/23/99 (D)	<b>Applicant:</b>	Knerr
<b>Case #/Type:</b>	41S-104572 (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	07/30/99	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/14/99	<b>Use:</b>	Irrigation

**M-5.1129** If applicant had met the criteria for issuance of a permit, the water right would be useless. The other users of the ditch  
**O-2.490** (Objectors) have senior rights and, with the inadequate ditch,  
**E-24.480** Applicant would never receive any water. DNRC has no jurisdiction  
**J-21.800** over ditch rights.

<b>Final Order Date:</b>	8/10/99 (GW/C)	<b>Applicant:</b>	Parks
<b>Case #/Type:</b>	76D-104069 (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	5/19/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/05/99	<b>Use:</b>	Fish and Wildlife

**E-24.4894** Reducing the stream flow is not an adverse effect if the prior  
**S-15.920** appropriator can reasonably exercise that prior right. Having to  
**A-4.9321** call the source is not an adverse effect. Calling the source is the  
**S-15.920** essence of the priority system. To prevent taking more water than  
**M-5.110** permitted, the intake pipe must be sized to divert only 20.97 gpm.  
**P-5.800** The return flow pipe must be sized to release a minimum of 20.97 gpm  
**U-14.1259.70** for the pond to be nonconsumptive.

<b>Final Order Date:</b>	12/23/99 (D)	<b>Applicant:</b>	McElfish
<b>Case #/Type:</b>	76H-103855 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/09/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	07/20/99	<b>Use:</b>	Irrigation

**B-21.780** Without a clear plan of his intentions, a permit cannot issue.  
**M-5.110** Here, applicant was not sure where the point of diversion would be  
**S-5.920** or whether the means of diversion would be a pump or gravity flow  
system or whether he would flood irrigate or use a sprinkler.

**Appealed to District Court.**

<b>Final Order Date:</b>	07/12/00 (G in part)	<b>Applicant:</b>	Baitis
<b>Case #/Type:</b>	76M-103849 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	06/08/98	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	11/17/99	<b>Use:</b>	Fish

**B-5.6934** Evidence must be presented to establish amount of water requested is  
**B-5.6979** necessary for the proposed use. Applicants unable to prove the  
proposed use of water for wildlife is beneficial. Fish pond is  
beneficial, providing benefit to applicant.

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<b>Final Order Date:</b>	10/03/00 (Gw/C)	<b>Applicant:</b>	Beardsley
<b>Case #/Type:</b>	41F-107597 (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	07/06/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	02/24/00	<b>Use:</b>	Stock/domestic

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**S-15.920** An undeveloped spring is surface water. A developed spring is groundwater. Source is flow of undeveloped spring on objector's property.

**M-5.110** Means of diversion is an infiltration gallery. To ensure only surface water is collected in the infiltration gallery, it cannot be perforated below the one-foot level.

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<b>Final Order Date:</b>	10/13/98 (D)	<b>Applicant:</b>	Blalack
<b>Case #/Type:</b>	43P-G (E) 086325 (G)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	10/23/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/11/98	<b>Use:</b>	Stock

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**O-23.6994** One cannot appropriate groundwater unless the appropriator has  
**S-15.920** possessory interest in the property where the water is to be put to beneficial use and has possessory interest in the property rights in the groundwater development works or the written consent of the person with those property rights as required by MCA 85-2-306(1997).

**E-24.4831** Department has authority to make and must make a threshold  
**J-21.800** determination on the existence and extent of the water right an  
**O-23.6994** applicant proposes to change. The Department may make a preliminary determination as to Applicant's ownership interest in the subject water right.

**E-24.4831** The Department will not and cannot grant a change authorization for a water right to a person who holds no possessory interest in that water right.

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<b>Final Order Date:</b>	01/10/00 (D)	<b>Applicant:</b>	Cross
<b>Case #/Type:</b>	G(W)142365-00 (c)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	01/14/99	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	08/10/99	<b>Use:</b>	Irrigation

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**A-4.9348.10** A change application cannot be used to expand the place of use if  
**A-4.9348.00** the change places an additional burden on the source. Here, Applicant applied to expand place of use by adding 150 acres, but did not prove that this would not increase the consumptivity of the use. Held, this is not a change, but a new appropriation, which would adversely affect other appropriators if change were granted.

**A-4.9348.00** The existence of an established water right does not give the  
**L-1.940** appropriator a right to increase his demand upon the source without making a new appropriation.

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<b>Final Order Date:</b>	(GW/C)	<b>Applicant:</b>	Day Spring Land Co.
<b>Case #/Type:</b>	(P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/12/97	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	06/15/98	<b>Use:</b>	Irrigation

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**I-14.900** The Department may issue an Interim Permit authorizing immediate

J-21.800 appropriation of water unless there is substantial information  
E-22.780 available to show the 311 criteria cannot be met. Here, there was  
B-21.780 information tending to show the criteria could be met but additional  
testing while actually irrigating was required to provide the  
preponderance of evidence needed.

I-14.900 Terms of Interim Permit included applicant filing a report to be  
reviewed by all parties who could comment on report and/or request a  
hearing. No comments were received and no request was made for a  
hearing. Permit granted with conditions.

<b>Final Order Date:</b>	04/99 (GwC)	<b>Applicant:</b>	Empire Sand & Gravel
<b>Case #/Type:</b>	42C-103575 (P)		
	43C-103601 (P)		
	43C-104945 (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	05/22/98		
	06/03/98		
	06/22/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	12/0998	<b>Use:</b>	Industrial

A-4.932 Having to call the source is not an adverse effect. Here, objector  
E-24.480 experienced some water shortage, and upon notification, applicant  
ceased diverting and objector was able to use his well. This is the  
very essence of the priority system.

A-4.9395 All fluids, including groundwater, can only flow down gradient.  
S-15.920 Objectors wells are up gradient. Moreover, applicant's well is  
withdrawing from a shallow alluvial aquifer while objector's well is  
in an aquifer 400 feet deep. There can be no adverse effect.

P-5.800 Permits are temporary and expire December 31, 2000.

<b>Final Order Date:</b>	09/09/99 Gw/C)	<b>Applicant:</b>	Flying J Inc
<b>Case #/Type:</b>	41I-105511 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	07/24/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	04/27/99	<b>Use:</b>	Commercial/irrigation

E-22.480 A witness need not have a degree in the subject matter to present  
proficient testimony about it when the witness has been involved in  
the subject matter for many years.

P-5.800 The criteria for issuance of a permit can be proved whether or not  
A-4.9394 not DEQ has made a non-degradation determination.

M-5.110 Water wells must be constructed according to the laws, rules, and  
A-4.9394 standards of the Board of Water Well Contractors to prevent  
S-15.920 contamination of the aquifer.

J-21.800 Leaky fuel tanks and storm water runoff which are unrelated to the  
removal of groundwater are not within the DNRC's jurisdiction.

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<b>Final Order Date:</b>	08/22/00 (Gw/C)	<b>Applicant:</b>	French
<b>Case #/Type:</b>	41S-105823 (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	11/30/98	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	02/15/00	<b>Use:</b>	Fish/irrigation

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U-14.1259.00      Source is water developed by placing drain tiles to collect  
S-15.920          groundwater which has not been historically available to downstream  
                     users.

M-5.1110          Applicant must be able to bypass natural flow of stream since  
A-4/930          application was for developed water.

B-5.6934          Evidence must be presented to show the amount of water requested is  
                     necessary to be beneficial and to show benefit to applicant or  
                     others. Applicant did not quantify the amount of water for wildlife  
                     nor establish the benefit to the appropriator. Permit cannot issue  
                     without such proof.

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<b>Final Order Date:</b>	08/02/99 (D)	<b>Applicant:</b>	Gerhart
<b>Case #/Type:</b>	41Q-105850 (SC)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/20/99	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/18/99	<b>Use:</b>	stock/wildlife/irrigation

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A-16.7521          An application deemed incorrect and incomplete must be returned to  
M-5.110          to applicant for correction and completion. Here, applicant  
S-15.920          applied for surface water which the Department determined was  
J.21.800          groundwater and returned the application. When excavation has been  
                     performed to bring the water to the surface, the source is  
                     groundwater Mont. Code Ann. § 85-2-102(9) (1999)

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<b>Final Order Date:</b>	07/28/98 (G)	<b>Applicant:</b>	Hamilton
<b>Case #/Type:</b>	76H-100868 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/08/97	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	05/08/98	<b>Use:</b>	Fish and Wildlife

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E-24.4831          Prior appropriators are not entitled to water stored by permittee.  
                     [FO]\_

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<b>Final Order Date:</b>	12/29/2000 (D)	<b>Applicant:</b>	Hensel Land Partnership
<b>Case #/Type:</b>	40A-107356	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	06/11/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	04/14/00	<b>Use:</b>	Fish and Wildlife

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E-22.480          Record reopened to allow applicant to provide written justification  
B-5.6934          for volume of water requested. No justification received. Evidence  
B-5.6979          to show why the quantity of water is required for fish and how the  
                     fish will survive when there is no flow is required to meet the  
                     criterion for beneficial use.

B-5.6934          Evidence is required to establish the amount of water for wildlife  
B-5.6979          use and to show how applicant or others would benefit from wildlife.  
                     Here, applicant failed to produce evidence to establish either.

<b>Final Order Date:</b>	08/02/00 (G in part)	<b>Applicant:</b>	Matheson
<b>Case #/Type:</b>	40A-108497	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	08/05/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	02/02/00	<b>Use:</b>	Lawn/garden/ stock/irrigation

**B-5.6934** Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove recreation, fish, and wildlife were beneficial uses. (Memorandum)

<b>Final Order Date:</b>	04/22/98 (D)	<b>Applicant:</b>	Mobley
<b>Case #/Type:</b>	42JG(W)002343 (C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	07/01/96	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	12/09/97	<b>Use:</b>	Irrigation

**S-15.920** Where source is waste water with point of diversion off-stream  
**A-4.9348.20** below two waterspreading systems. Upstream water user no longer  
**M-5.110** wastes water from one system to Applicant's pick up point. Point  
**W-1.870** of diversion cannot be changed to on-stream site without means to  
measure waste water flowing back into stream.

<b>Final Order Date:</b>	01/05/01 (D)	<b>Applicant:</b>	Mohl
<b>Case #/Type:</b>	76G-106676 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/16/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	06/21/2000	<b>Use:</b>	Stock

**A-16.7567** A permit application may be modified at hearing if amendments would not prejudice anyone.

**A-4.930** Carriage water must be included when calculating the amount of  
**E-24.480** water to be left in stream. Here, Applicant proposed to leave 1.25  
cubic feet per second which is the total flow.  
rate of water rights downstream. Water would never get down  
to some of users.

<b>Final Order Date:</b>	NA (Gw/C)	<b>Applicant:</b>	Shemer
<b>Case #/Type:</b>	43C-G(W)02364(C)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	02/27/97	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	11/12/97	<b>Use:</b>	Irrigation

**A-4.930** Installing a water gap in applicants' fence would mitigate any  
**E-24.4879** adverse effect to objector's stock use caused by moving the ditch  
**O-2.490** outside objector's fence. (P4D)

Agreement reached before oral argument. No final order.

<b>Final Order Date:</b>	03/12/99 (Gw/C)	<b>Applicant:</b>	Richland County Conservation Dist.
<b>Case #/Type:</b>	42M-G(M)103698	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	09/01/98	<b>Examiner:</b>	Lighthizer
<b>Hearing Date:</b>	01/28/99	<b>Use:</b>	Irrigation

**R-5.850** A change of water reservation must establish purpose, need, and amount of water necessary for the change of reservation, and that the change of reservation is in the public interest. Here, applicant

has established the water to be changed is necessary for crop irrigation on the project property and the project is in the public interest.

**A-4.9348.00**  
**E-24.4879**  
**S-15.920**

Objectors are entitled to maintenance of original stream conditions unless the appropriation can be reasonably exercised under changed conditions. Here, objectors would still have the volume of Yellowstone River water flowing past their property. Having to install a pump in the river is not an adverse effect if objectors can reasonably exercise their water right by doing so.

**E-22.480**  
**B-21.780**

Application to change results in 4,000 or more af/year and 5.5 cfs of water consumption. Applicant has the burden to prove by clear & convincing evidence the criteria in § 85-2-402(2) & (4) is met.

**M-5.110**  
**E-14.9376**  
**A-4.9394**

Means of diversion is a cluster of pumps in the river. Permittee must install signs upstream and downstream to warn boaters of the hazard. Appropriator must work with agencies to determine wetlands mitigation measurements to be implemented to protect the quality and quantity of water in Fox Creek, Crane Creek and Sears Creek drainages.

<b>Final Order Date:</b>	06/01/00 (G in part)	<b>Applicant:</b>	Woods
<b>Case #/Type:</b>	41H-104667(P) 41H-G(W)125497(G)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	06/25/98	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	01/20/00	<b>Use:</b>	Fish/fire protection

**B-5.6934**  
**B-21.780**

Evidence must be presented to show why the amount of water requested for use is necessary. Here, applicant did not prove the amount of water requested for wildlife use was necessary and therefore beneficial. Evidence must show how pond use would benefit applicant or others. Here, the fish pond use is a beneficial use since fishing from the pond would improve campus life at the school.

**B-5.690**

In this case fire protection is a beneficial use. A water reservoir for fire fighting is a county subdivision requirement that must be satisfied before buildings can be occupied.

**A-4.9321**

Having to call the source is not an adverse effect.

**U-14.1259.70**  
**U-14.1274**

To ensure the pond is non consumptive, intake and outflow conveyances must be lined or conveyed by pipe. Evaporation must be replaced by some reduction in other uses. Here the water would be replaced by water made available through the change of another water right.

**A-16.750**

The proposed flow rate cannot produce the volume of water requested on the application. Volume reduced to 63.6 acre-feet.(FO)

<b>Final Order Date:</b>	01/31/01	<b>Applicant:</b>	Rock Chuck Ranch
<b>Case #/Type:</b>	41D-G(W)194315 (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/19/96	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	04/17/00	<b>Use:</b>	Irrigation

**A-4.9348.00**  
**A-4.9379**

A senior water right owner cannot change the point of diversion to the detriment of a junior user. Here, Applicant proposed to move his point of diversion upstream of a junior on the basis that he could not adversely affect the junior

because the senior had an earlier priority date which made it superior.

**M-5.110** Applicant must prove the means of diversion, construction, and operation of the appropriation is adequate. Absent such proof, a change of water right cannot be issued.

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<b>Final Order Date:</b>	01/31/01	<b>Applicant:</b>	Wahl
<b>Case #/Type:</b>	43C-106059 (P)	<b>Regional Office:</b>	Billings
	43C-106060 (P)		
<b>Application Date:</b>	02/18/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	08/09/00	<b>Use:</b>	Commercial Fish Pond

**A-16.7567** Application may be amended after public notice if  
**A-16.7576** amendments would not prejudice anyone. Here, the applicant reduced the amount of water requested and amended the proposed use to commercial trout from wildlife and waterfowl. Held, a reduction of the flow rate cannot cause prejudice and the proposed change of use changed the label but not the substance of the application notice.

**S-15.920** The new point of diversion must not restrict the source, a drain  
**M-5.110** ditch. Applicant required to construct the means of diversion so flows in the source drain ditch immediately return to the source.

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<b>Final Order Date:</b>	03/20/01	<b>Applicant:</b>	Moldenhauer
<b>Case #/Type:</b>	41I-G(W)001042 (C)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	05/25/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	10/30/99	<b>Use:</b>	Irrigation

**A-4.9348.20** Proof of conveyance of original water right from owner of the  
**A-4.9348.00** historic place of use is critical to show a portion of the  
**S-15.9220** water right will not be claimed and used by the new owner of the historic place of use thus enlarging the appropriation causing an additional burden on the source.

**B-5.6979** When seeking to change a water right, an applicant must show the  
**A-4.9325** amount of water to be changed was used in the historic place of use.  
**E-22.480** Here, the amount of water to be changed was 156.6 acre-feet per  
**B-21.780** year. The Department estimated the reasonable amount of water needed to irrigate the original place of use was 52 acre-feet per year considering the decreed limits, the efficiency of the system, and the consumptive crop use. Applicant offered no evidence to the contrary.

**E-22.480** Testimony of Applicant outweighed by first-hand knowledge testimony of former owner.

**M-5.110** Rehabilitation of an existing diversion works and ditch system can be considered as an adequate means of diversion, construction, and operation of the appropriation works.

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<b>Final Order Date:</b>	03/26/01	<b>Applicant:</b>	Barber
<b>Case #/Type:</b>	41Q-G(W)110197 (C)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	01/21/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	01/10/01	<b>Use:</b>	Domestic

**J-21.800** Only the Department can grant a change of appropriation water  
**L-1.940** right. The purpose of use may have been altered many years

B-21.780  
A-4.9373  
M-5.110

ago; however, by law, there was no change. Now, 17 years after the altered purpose and place of use, applicants have the burden to prove the criteria for change are met. To meet the criteria for change as set forth in 85-2-402(a) and (b), the means of diversion must be altered to equally divide the water as stated in the contract for deed.

**[Appealed to District Court.]**

<b>Final Order Date:</b>	05/14/01 (G w/C)	<b>Applicant:</b>	Phillip and Pamela Nash
<b>Case #/Type:</b>	43QJ-P109903	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	02/09/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/07/01	<b>Use:</b>	Irrigation

Property damage or the possibility of property damage (by raising groundwater level) as a result of a permittee exercising its water right is not reason to deny a permit.

P-18.720

Even if property damage was reason for denial, there is no evidence, beyond conjecture, that this diversion has increased groundwater levels at the Objectors' property located one-half mile upstream and ten feet higher in elevation from the Applicant.

<b>Final Order Date:</b>	5/23/01 (G w/c)	<b>Applicant:</b>	Sunny Brook Colony
<b>Case #/Type:</b>	41P-105759 (P)	<b>Regional Office:</b>	Havre
<b>Application Date:</b>	9/22/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	10/11/00	<b>OA Examiner:</b>	Stults
<b>Oral Argument Date:</b>	4/26/01	<b>Use:</b>	Irrigation

U-14.1274  
U-14.1259.00

Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights and reduce exaggerated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available.

A-4.93  
R-5.85  
E-14.930

Upstream senior rights can not be adversely affected. Permittee must record daily use rate, instead of monthly flows, to assure DFWP instream reservation is not affected. Permit conditioned to a trigger flow, or cutoff flow, at the upstream gauge based on the higher DFWP biological needs identified in the Environmental Assessment instead of the lower DFWP reservation. **[PFD Trigger flow lowered to DFWP reservation flow in Final Order]**. Adverse affect recognized for measured actual use rather than uses in Department records.

R-5.850

Cutoff flow need not include irrigation reservations flows until they are perfected.

**[P4D modified by OA.]**

<b>Final Order Date:</b>	06/08/01 (G W/C)	<b>Applicant:</b>	Ellie Cox
<b>Case #/Type:</b>	76H-G(P)053960 (G)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/09/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	09/08/00	<b>Use:</b>	Fishery

E-14.930  
T-5.800

Proposal for decision conditioned the authorization based on findings in the agency Environmental Assessment. Prior to Final Order HB 473 became law; HB 473 does not allow conditioning based upon findings in an EA. The conditions are also typical of those used to show the diversion works are adequate, and Applicant had agreed to the conditions (also imposed by the County Land Services Office). **(FO did not modify the conditions for these reasons.)**



B-5.6934  
B-5.6979

Evidence must be presented to establish amount of water requested is necessary for the proposed use. Fish pond is beneficial, providing benefit to applicant when stocked with fish from a lawful source according to a DFWP private pond license.

A-4.9348.48  
T-5.800

Applicant showed amount being changed had actually been put to prior use, and agreed to measure amount diverted to the changed use to show the right is not being enlarged. The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, water use measurements go to the issue of adverse effect. Evaporation required to be made up by not diverting balance of the right remaining.

[P4D modified by FO: Conclusions of Law modified; conditions remain the same.]

<b>Final Order Date:</b>	06/??/01 (G W/C)	<b>Applicant:</b>	Kellogg
<b>Case #/Type:</b>	41U-106673 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	02/11/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	8/18/00	<b>OA Examiner:</b>	Lighthizer
<b>Oral Argument Date:</b>	5/21/01	<b>Use:</b>	Domestic, Lawn/Garden, Stock, Fishery

U-14.1259.00  
U-14.1274

To comply with Mont. Code Ann. §85-2-311(1)(a), applicant must prove that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, or is available during high flows to store for use during low flow periods.

J-21.800  
U-14.120  
U-14.1259.70  
S-20.720  
S-15.920  
T-5.800  
L-1.940  
W-1.87

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed Mont. Code Ann. § 85-2-311 and 85-2-343 (Upper Missouri Basin Closure). Here permit is conditioned to fill pond during high spring flows from Joslyn Creek, a consumptive use in a partially closed basin. After the high spring flow period, the pond must be operated so that it is non consumptive and does not affect existing rights. Evaporation must be stood by the stored water in the pond. Conditions requiring the pond outlet device be modified so it can pass inflows after high spring flow period, and after the high spring flow period pond inflow must equal pond outflow.

Appealed to District Court 8/01

<b>Final Order Date:</b>	06/07/01 (G W/C)	<b>Applicant:</b>	Lang
<b>Case #/Type:</b>	76L-109371 (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	09/21/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	9/7/00	<b>Use:</b>	Domestic, Commercial water bottling

A-4.9383  
S-15.920

The waters of a tributary may not be diverted to the injury of prior appropriators. The establishment of a tributary relationship is a question of fact. The groundwater flowing at the proposed point of diversion has been established as non tributary to the surface flows relied upon by prior appropriators (Confederated Salish & Kootenai Tribes Indian Reserved rights), therefore it may be diverted.

E-24.4848

Any Confederated Salish and Kootenai Tribal reserved rights in the source of supply must be protected.

E-24.4879  
M-5.110

Objectors' prior rights in the artesian aquifer do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the change.

T-5.800

The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, water quantity and quality measurements go to the issue of beneficial use. Measuring quality and quantity shows the standards for bottled water continue to be met, and establishes the quantity of water finally appropriated for this use.

U-1259.00

Found no connection between the groundwater aquifer and the surface flows; thus, held legal availability could be determined even though an un-quantified Indian Reserved right to surface flows exists. Other Objectors are in the same aquifer as Applicant, and the trend in aquifer flows and pressure is downward in their wells; however, their wells continue to flow under pressure. Held water legally available because no testimony of calls or insufficient water in the aquifer.

**Petition for Writ of Supervisory Control filed with Montana Supreme Court** by CSKT (time for appeal of Final Order tolled by the Mt Sup Ct)

<b>Final Order Date:</b>	06/25/01 (G w/c)	<b>Applicant:</b>	Durocher
<b>Case #/Type:</b>	41QJ-111525 (P)	<b>Regional Office:</b>	Lewistown
<b>Application Date:</b>	05/02/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/14/01	<b>Use:</b>	Wildlife & wetland Habitat

L-1.940

Diversion is within the Upper Missouri Basin closure area which limits diversions to storage during high spring flows. Finding no statutory definition of "high spring flows" the hearing examiner defined such for purposes of the order. "High spring flows are seasonal, sustained, moderately high flow characteristic of a basin or region affected by runoff from the winter snowpack." Diversion limited to high spring flows.

<b>Final Order Date:</b>	07/23/01 (G w/c)	<b>Applicant:</b>	Carlson
<b>Case #/Type:</b>	76LJ G(P)007481 (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	02/02/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/21/01	<b>Use:</b>	Industrial (gravel washing)

A-4.9394

Department determined water quality objection valid for a limited scope. Authorization conditioned to prevent runoff through berms containing harmful hydrocarbons from entering groundwater through the gravel washing settling ponds.

<b>Final Order Date:</b>	08/21/01 (G w/c)	<b>Applicant:</b>	The Briarwood
<b>Case #/Type:</b>	43Q-107167 (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	06/22/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	03/28/01	<b>Use:</b>	Irrigation

U-14.1259.00  
U-14.1274

Application is for storage of flood flows. Water physically available only during high or flood flows on an uncertain frequency as shown by Applicants projections using data from nearby gauged streams and Objector observations. Flood flows estimated by applicant with a numerical flow rate that exceeds existing downstream rights and recharge for a downstream adjacent shallow aquifer. Diversion limited to times streamflows exceed this flowrate as shown on a staff gauge to be installed by Applicant under auspices of a professional engineer.

P-5.800

Compliance problems with previously issued permits or water use have no relevance in a hearing for a new application.

S-21.6625

Several objectors did not appear for the hearing. Default may occur when an appropriator does not appear at a properly noticed hearing. The Objectors' interests in the proceeding were dismissed.

<b>Final Order Date:</b>	08/2/01 (G)	<b>Applicant:</b>	Savik
<b>Case # (Type):</b>	76M-112876 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	11/28/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	6/13/01	<b>Use:</b>	Multiple domestic/lawn & garden

A-4.9395  
B-21.780

Applicant who provided evidence that a .02 foot lower groundwater level would not cause adverse effect to the Objectors has met his burden of proof. Objectors' wells fully penetrate the aquifer; however, Objectors did not state why they could not reasonably exercise their rights under the changed conditions and have not met their burden of production.

<b>Final Order Date:</b>	9/14/01 (D)	<b>Applicant:</b>	USA (DOI/BLM)
<b>Case #/Type:</b>	40J-111302 (P), 40M-111303 (P)	<b>Regional Office:</b>	Glasgow
<b>Application Date:</b>	2/17/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	11/16/00	<b>Use:</b>	Stock/fishery/waterfowl/ wildlife pond

B-21.780  
U-14.1259.00  
U-14.1274

Water shown to be physically available using runoff estimating techniques and size of upstream diversions. In application 40M-111303 evidence showed it may take two years to fill the proposed reservoir. Applicant failed to prove water present was not needed downstream to fulfill senior water uses, or that a call by downstream seniors would be futile. Absent an objection by a downstream appropriator, the comparison of water physically available with existing demands must still be addressed.

A-4.9321  
M-5.110

Adverse affect may occur and the means of operation are not adequate since there is no release mechanism to pass through water in excess of the annual appropriation or to honor a legitimate call from a downstream appropriator in the event of a precipitation event.

B-5.6934  
B-5.6979

Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove waterfowl and wildlife were beneficial uses.

A-16.7576

Application may be amended after public notice if amendments would not prejudice anyone. Here, the applicant added the fishery purpose at hearing. Held, the proposed change of use changed the label but not the substance of the application as noticed; thus, the amendment did not prejudice anyone.

<b>Final Order Date:</b>	9/24/01 (G W/C)	<b>Applicant:</b>	Mayne
<b>Case #/Type:</b>	41F-108990 (P)	<b>Regional Office:</b>	Bozeman
<b>Application Date:</b>	10/3/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	7/11/01	<b>Use:</b>	Stock/fire protection

U-12.59.00  
U-12.74  
T-5.80

Applicant measured flows in the source in different years. Measured flows vary and above and below existing downstream demands, and depend upon climatic conditions. Applicant agreed to measure the source and not divert when flows were less than downstream demands. Permit conditioned such that Applicant must measure source at the point of diversion and stop diverting when flows drop below 20 gallons per minute.

M-5.11  
W-1.87  
T-5.80

Applicant must line the pond to prevent seepage, and provide fire department access according to local department regulation, and make up any evaporation from another source.

J-21.800  
S-20.720  
S-15.920  
T-5.800  
L-1.940  
W-1.87

Department has authority to condition permits provided such conditions are necessary to satisfy criteria listed Mont. Code Ann. § § 85-2-311, 341, and 343 (Madison, Upper Missouri Basin Closure). Here permit is conditioned to fill pond during high spring flows. Evaporation must be stood by the stored water in the pond or be replaced from a groundwater source.

B-5.6979  
B-21.780  
L-1.940  
S-20.720

Applicants must prove amount of water is not wasteful. Applicants did not establish the flow through amount requested to keep the stockwater fresh is reasonable and does not constitute waste. Lesser amounts may have accomplished the same result. Without evidence of why the requested rate was needed, the use could not be determined beneficial, and was not allowed. Therefore, as to flow through, the criterion was not met.

As to fire protection the volume of water to be stored in the pond was justified based on a possible future structure fire. Thus, it is not an "emergency appropriation" exempt from the closure.

<b>Final Order Date:</b>	07/09/01 (G w/c)	<b>Applicant:</b>	Peterson / MDOT
<b>Case #/Type:</b>	76GJ-110821 (P)	<b>Regional Office:</b>	Missoula
<b>Application Date:</b>	05/10/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	None (settled)	<b>Use:</b>	Wildlife/Waterfowl habitat mitigation

L-1.940  
T-5.80

Groundwater project lies in the Upper Clark Fork River Basin Closure Area. Groundwater permits may be issued if an augmentation plan shows surface water depleted by the loss of tributary groundwater will be sufficiently augmented in amount, time, and location to replace depletions to senior rights in the receiving waters (and all other criteria are met). Applicant's plan augmented appropriators down-ditch rather than down-gradient surface waters. Because Applicant's augmentation plan does not accomplish the statutory requirement, a condition must be placed on the permit requiring applicant to obtain a change of use for the augmentation water which comes from an existing right, and require a portion of the existing right to remain in the source of the existing right to replace depletions to senior rights.

<b>Final Order Date:</b>	11/16/01 (DJ)	<b>Applicant:</b>	Borland
<b>Case #/Type:</b>	43C-112035 (P)	<b>Regional Office:</b>	Billings
<b>Application Date:</b>	10/31/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	9/25/01	<b>Use:</b>	Wildlife Habitat

U-14.1274

Applicant failed to meet burden to show water reasonably available in amount sought to appropriate during the period Applicant seeks to appropriate. Applicant's personal observations of streamflow and snow drifts in the upper drainage since 1992 not confirmed by Applicant's own weir measurements of flow at the proposed point of diversion.

U-14.1259.00

Applicant did not show that downstream exempt stockwater rights and other filed rights would have sufficient flows during times the proposed pond would take all the flow for filling, or that pond seepage and evaporation would not be destined for downstream existing rights.

A-4.93  
B-21.78

Applicant did not show that after the initial fill the pond would be non consumptive with a minimal 1-2 acre-feet of evaporative loss per year. The evaporated volume is equal to a flow  $\frac{1}{3}$  of that measured by a downstream objector. Applicant met initial burden by submitting a correct and complete application. After objections Applicant is required to provide additional information to overcome objections. Applicant had the burden to show downstream rights could be reasonably exercised during times of pond evaporation and filling, but did not.

M-5.11

Applicant did not show they could honor a downstream call at times the pond water level was below the stop planks in the vertical release pipe. Applicant did not explain the contradiction that soils beneath the pond are a tight clay type and their statement that geology in the area causes Horse Creek to go underground. Applicant had no plan to prevent increased seepage at the pond site.

B-5.6934

The wildlife habitat to benefit from the proposed appropriation are naturally occurring in the area and not under the control of Applicant. Evidence is required to prove the proposed uses are beneficial. To prove these uses are beneficial, one must show a certain amount of water is necessary to sustain such use and how that use would be beneficial to applicant. Here, applicant failed to prove wildlife habitat is a beneficial use.

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<b>Final Order Date:</b>	02/19/02 (G W/C)	<b>Applicant:</b>	Taylor
<b>Case #/Type:</b>	41B-111806 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/16/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	11/07/01	<b>Use:</b>	Irrigation (golf Course)

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U-14.1274  
T-5.80

Applicant provided hydrologic evidence of available water via a one-time pump test and mass balance determination, and by agreeing to measure water diverted so the water from this source could be determined and shown to exist beyond the term of the pump test.

A-4.93  
B-21.78

Applicant provided evidence that pumping the proposed shallow source would not affect Objector's spring flows has met his burden of proof. Objectors who produced no evidence that pumping this source would adversely affect their spring flows have not met their burden to go forward

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<b>Final Order Date:</b>	02/19/02 (G W/C)	<b>Applicant:</b>	Taylor
<b>Case #/Type:</b>	41B-111807 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	06/16/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	11/07/01	<b>Use:</b>	Irrigation (golf Course)

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T-5.800  
A-4.9395

Applicant must test his well(s) when drilled to confirm aquifer characteristics used in prehearing projections are real. Applicant must monitor pumping rates and volumes to provide data to determine affects to nearby spring flows, if any. Applicant's evidence was from a one time 24-hour pump test in the 1980's from a well which saw only one year of use. To show lack of adverse affect from long term use, Applicant must monitor static water levels each season for five seasons. The Department may condition any permit or authorization as long as the condition or limitation serves to meet the criteria for issuance. Here, static water measurements go to the issue of adverse effect.

E-24.4879

Objectors' prior rights do not entitle them to prevent changes in the conditions of water occurrence in the source if they can reasonably exercise their rights after the changed conditions.

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<b>Final Order Date:</b>	08/16/02 (D))	<b>Applicant:</b>	Mineral Rights Unlimited, LLC
<b>Case #/Type:</b>	41I 111746 (P)	<b>Regional Office:</b>	Helena
<b>Application Date:</b>	5/12/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	01/10/02	<b>OA Examiner:</b>	Hall
<b>Oral Argument Date:</b>	06/06/02	<b>Use:</b>	Mining

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B-21.78  
E-21.80

Applicant must present evidence to make a prima facie case to meet the preponderance standard. Applicant cannot meet this statutory requirement by waiting until the Department's application review reports are in the file and having their expert critique them. Applicant must present a prima facie case for the burden of production to shift. Applicant did not present a prima facie case.

Applicant relies on §§ 26-1-301, 401, 403, but those statutes do not mandate anything in a case where the facts are disputed. Here, the Hearing Examiner chose to believe other non-expert witnesses; the fact finder is not mandated to believe Applicant's witness.

A-4.9394

A statement by Applicant that they will add no chemicals in the mining operation is not sufficient to show no adverse effect to water quality. Evidence showing the material mined and coming in contact with the water during the placer operation will not adversely effect the water quality is needed but was not provided.

<b>Final Order Date:</b>	07/29/2002	<b>Applicant:</b>	Siebel, Kenneth F. and Judith A.
<b>Action:</b>	Granted with Conditions		
<b>Case/Application #:</b>	76H106450, 76H-106451; 76H-106452, 76H-106454	<b>Regional Office:</b>	Missoula
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	03/19/99	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	11/27/2001	<b>OA Examiner:</b>	Stults
<b>Oral Argument Date:</b>	05/08/2002	<b>Use:</b>	Fishery, recreation, wildlife/waterfowl

PFD: Evidence not provided to establish direct correlation between the amount of water applied for and the need for that amount of water to sustain a defined fishery, wildlife, or waterfowl population, or recreational activity. Therefore, applicant did not prove minimum amount necessary for beneficial use. Proposed use not proven to be a beneficial use. If quantity of water necessary to sustain the use cannot be determined, permit cannot be granted.

B-5.6910  
B-5.6934  
B-5.6979

**FO: Reversed.** Applicant proved that quantity of water proposed to be used is the amount reasonably necessary for proposed use. Proved that proposed use of water is a beneficial use of water. A use that cannot reasonably be quantified cannot be recognized as a water right. Since applicant makes no assertion of legal control over fish or wildlife, applicant is left with burden of establishing actual need for the amount of water requested. Applicant need only establish a reasonable amount of water to meet burden of proof; private appropriator does not need to control or manage the fish, wildlife, or waterfowl. Since at least 1986, DNRC has, on an application-by-application basis, applied reasonable amount quantification for beneficial uses associated with pond development.

E-22.480

What a DNRC employee felt prior to hearing is not probative of whether in fact statutory criteria satisfied.

E-22.480

Interlocutory order allowing more time to provide evidence not appropriate when applicant is not arguing that there is new additional evidence to be presented.

L-1.940

Hearing Examiner not bound by agency written policies not formally adopted under MAPA.

E-22.480

L-1.940

Legal conclusions in memorandum from DNRC attorney not binding on hearing examiner. Memorandum not relevant to establish existence of law; treated as legal argument of objector.

T.5800

Conditions: decreed stream-water commissioner; water measurement records required; fish-friendly diversion structure required in Mitchell system; control structure to regulate diversion of water required; separate private agreement not recognized but included in file.

**Appealed to MT District Court** (Cause No. BDV-2002-519). Final order reversed and hearing examiner's order reinstated. District Court held DNRC erred in allowing heavily amended applications to proceed after closure of the Bitterroot subbasin to appropriation.

**Appealed to MT Supreme Court** (Case No. 03-753).

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<b>Final Order Date:</b>	09/24/03	<b>Applicant:</b>	French, Daniel and Roberta
<b>Action:</b>	Granted With Conditions		
<b>Case/Application #:</b>	41S 11321999	<b>Regional Office:</b>	Lewistown
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	05/31/00	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	02/27/03	<b>OA Examiner:</b>	
<b>Oral Argument Date:</b>		<b>Use:</b>	Ir

O-2.490  
S-20.11

A person has standing to file an objection if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation. Mont. Code Ann. § 85-2-308(3). Objectors claimed upstream interests which may be effected by the proposed appropriation. Burden of production moves to the Objector after the Applicant makes a prima facie case. Here, Objector did not bring adequate proof to overcome Applicant's proof.

A-4.9392  
A-4.9348.00

Prior to the hearing Objector and Applicant entered into a separate private agreement. The private agreement which the Applicant and Objector can enforce in court between the parties, contains conditions which are not appropriate for placement on any authorizations that may issue. Expansion of the period of use under the guise of a change is not allowed. An increased use of water is a new appropriation.

L-1.940

Objector Ackley Lake Water Users Association could not be represented by its President and Vice-President and were informed by the Hearing Examiner that corporations must be represented by counsel in administrative hearings. The Association President could only read or make a statement for the record but could not cross-examine other witness, introduce witnesses, making opening or closing statements, object to testimony or exhibits.

L-1.940

A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney  
There can be no claim of adverse effect by Objector if Objector has no water right.

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<b>Final Order Date:</b>	10/09/2002	<b>Applicant:</b>	Three Creeks Ranch of Wyoming, LLC
<b>Action:</b>	Granted; Granted in Part with Conditions		
<b>Case/Application #:</b>	41C-11339900; 41C-19391600	<b>Regional Office:</b>	Bozeman
<b>Application Type:</b>	Permit; Change		
<b>Application Date:</b>	10/13/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	05/22/2002; 6/3/2002	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	stock; fish; wildlife

A-4.930  
U-14.1259.00

Water is legally available when it is not destined for a senior appropriator at a time it can be diverted and used by the senior. Objector did not provide sufficient evidence water at issue is destined to its right at a time objector can put to use.

E-24.4831

Actual beneficial use is basis for historic right, not Water Court decree.

M-5.110

Extent of information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity. Project designed by licensed engineer meets adequate means of diversion criterion in this instance.

B-21.780

Applicant has the burden to produce a preponderance of evidence on a criterion even if the DNRC doesn't request it.

T-5.800 41C-19391600: Authorization may be reduced to historic use established under adjudication; removal of acreage from irrigation; storage pond designed by licensed engineer; and operation of headgate.

E-22.480 Used evidence in permit application (not in change application)  
A.16.7567 to grant change authorization. No prejudice to objector/area water users because amounts are less than stated in public notice.

B-5.6934 Applicant did not prove flow rate and volume reasonably  
B-5.6979 necessary for proposed fishery, wildlife, and waterfowl uses.

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<b>Final Order Date:</b>	11/29/2002	<b>Applicant:</b>	Louisiana Land & Livestock, LLC
<b>Action:</b>	Granted in Part-Denied in Part		
<b>Case/Application #:</b>	76LJ-00796599	<b>Regional Office:</b>	Kalispell
<b>Application Type:</b>	Change		
<b>Application Date:</b>	10/04/2001	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	08/01/02	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	irrigation, fish

E24-4831 An increased use of water is a new appropriation and cannot be allowed under the guise of a change application. (Change limited to historic use.)

B-5.690 Applicant did not prove that changing the point of diversion for an irrigation right that will not be used is a beneficial use of water.

A-4.930 Adverse effect criterion applies to existing rights of other persons, not just rights of those who object to the application.

E-22.480 **Final order:** New evidence cannot be introduced after record closed without reopening the record. Finding of fact not changed.  
R-5.930 **Final order:** Hearing examiner not required to address every fact to make decision, only findings and conclusions that are the basis for decision.

T-5.800 Minimum pond outflow; point of pond outflow; discontinue irrigation of specified acres, prohibition on diversion under two permits at same time; pond stocking permit and stocking required; issuance of pending permit required; authorization to be reduced if historic use reduced by adjudication; specified measuring device required; flow and volume records required.

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<b>Final Order Date:</b>	10/09/2002	<b>Applicant:</b>	Wilkins, Dave and Howard
<b>Action:</b>	Granted With Conditions		
<b>Case/Application #:</b>	76LJ-11406600	<b>Regional Office:</b>	Kalispell
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	12/15/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	08/13/2002	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	power generation

T-5.800 Minimum flow instream below point of diversion; return water diverted to stream at specified point; specific construction measures required to dissipate energy of falling water to prevent channel bed erosion by water re-entry; measuring device and reporting of flow and volume required.

Minimum flow condition not usually placed on permits; however, pursuant to MEPA, measures mutually developed at the request of project sponsor may be incorporated into a permit.



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<b>Final Order Date:</b>	12/12/2002	<b>Applicant:</b>	Poulsen, Harold
<b>Action:</b>	Denied		
<b>Case/Application #:</b>	41K-11226000	<b>Regional Office:</b>	Lewistown
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	07/24/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	09/11/2002	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	stock; erosion

**A-4.9392**                      Applicant's agreement to conditions becomes an implied plan to  
**T-5800**                      assure use of water can be controlled so water rights of prior  
                                 appropriators will be satisfied.  
**B-5.690**                      Applicant did not prove erosion control purpose is a beneficial  
**B-5.6979**                      use of water.  
                                 Applicant did not show flow rate that can be beneficially used  
                                 for stock purposes without waste.  
**S-15.920**                      Without ditch company canal, water would flow to Sun River;  
**J-21.800**                      therefore, water is tributary to the Sun River and exception to  
**U-14.1259.00**                basin closure for erosion control in Muddy Creek drainage does not  
                                 apply.  
**R-5.930**                      **Final order:** No need to address the exceptions of objector  
                                 whose interests cannot be prejudiced due to denial of application.

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<b>Final Order Date:</b>	12/24/2002	<b>Applicant:</b>	Smelko, Daniel B. and Terry M.
<b>Action:</b>	Granted With Conditions		
<b>Case/Application #:</b>	41I-143072	<b>Regional Office:</b>	Helena
<b>Application Type:</b>	Change		
<b>Application Date:</b>	11/13/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	06/19/2002	<b>OA Examiner:</b>	Martin
<b>Oral Argument Date:</b>	11/25/2002	<b>Use:</b>	irrigation

**E-24.4810**                      Issues of abandonment, inclusion in a Water Court decree, and  
**E-24.4831**                      lack of objection to a water right in a water right in a Water  
                                 Court decree are all matters that require supporting evidence to  
                                 prove whether or not use exists that can be changed. Applicant  
                                 provided evidence of minimal prior use in late 1970's. Although  
                                 significant time has elapsed, it does not appear the rights have  
                                 been abandoned. No evidence of abandonment beyond personal belief  
                                 presented to establish rights abandoned.  
**T-5.800**                      Authorization to be reduced if historic use reduced by  
                                 adjudication; purchased flow rate to be left instream at old point  
                                 of diversion; measuring device required; hours and rate of pumping  
                                 to be recorded for first full irrigation season; combined  
                                 appropriation for associated water rights with overlapping places  
                                 of use limited to 38.1 acre-feet.

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**Final Order Date:** 01/19/2003  
**Action:** Granted in Part with Conditions; Denied in Part  
**Applicant:** Weidling, Benjamin L. & Laura M.  
**Case/Application #:** 76LJ-11583100  
**Regional Office:** Kalispell  
**Application Type:** Permit  
**Application Date:** 05/23/2001  
**Examiner:** Brasen  
**Hearing Date:** 09/26/2002  
**OA Examiner:** none  
**Oral Argument Date:** none  
**Use:** fish, wildlife, irrigation

**S-15.920** Water being appropriated may have been ground water originally; however, water being appropriated in this application is not water that was brought from below the ground surface by this project. Water being appropriated is surface water.

**U-14.1259.00**  
**E-24.4831** Legal availability is determined by analysis of nondrought periods. Using DNRC records to determine existing legal demands on the source is merely a starting point. The actual needs of valid water rights are the basis for determining existing legal demands. Water rights claimed are *prima facie* only in the adjudication and are not binding in this proceeding. Although smaller rights were claimed by objector in adjudication than actual historic use testified to in this proceeding, actual beneficial use is the basis, the measure and the limit of all rights.

**M-5.110** Allowing all water diverted to pond to seep out bottom is a wasteful use of water when alternatives exist that prevent such loss and still accomplish the intended purpose.

**W-1.870**

**B-5.6934** Applicant did not prove that quantity of water proposed to be used for fish and wildlife is minimum amount necessary for proposed beneficial use.

**B-5.6979**

**L-1.940** Rescinding a policy does not replace the burden an applicant has to show the proposed use is a beneficial use of water and the amount requested is justified.

**M-5.110** **Final order:** The record does not show that inspection of means of diversion, construction, and operation by licensed engineer is necessary to show criteria are satisfied.

**T-5.800** Diversion limited to certain months; pond must be lined to prevent seepage; and excess water must be diverted back to source. **Final order:** Record does not show that continuous flow monitoring by applicant will help satisfy a criteria for issuance of a permit. Monitoring upstream of objectors will not tell applicant what objectors' needs are.

Consolidated with hearing *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583000* by Ramona S. and William N. Nessly  
Appealed to District Court.

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**Final Order Date:** 01/19/2003  
**Action:** Granted in Part with Conditions; Denied in Part  
**Applicant:** Nessly, Ramona S. and William N.  
**Case/Application #:** 76LJ-11583000  
**Regional Office:** Kalispell  
**Application Type:** Permit  
**Application Date:** 05/23/2001  
**Examiner:** Brasen  
**Hearing Date:** 09/26/2002  
**OA Examiner:** none  
**Oral Argument Date:** none  
**Use:** fish, wildlife, irrigation, stock

**M-5.1129** Property ownership at point of diversion not relevant after Hearing Examiner determined water subject to application was surface water, not ground water. Right of access by way of an easement is not a criterion for issuance of permit.

**S-15.920** Water being appropriated may have been ground water originally; however, water being appropriated in this application is not water that was brought from below the ground surface by this project. Water being appropriated is surface water.

**U-14.1259.00**  
**E-24.4831** Legal availability is determined by analysis of nondrought periods. Using DNRC records to determine existing legal demands on the source is merely a starting point. The actual needs of valid water rights are the basis for determining existing legal demands.

Water rights claimed are *prima facie* only in the adjudication and are not binding in this proceeding.

Although smaller rights were claimed by objector in adjudication than actual historic use testified to in this proceeding, actual beneficial use is the basis, the measure and the limit of all rights.

**M-5.110**  
**W-1.870** Allowing all water diverted to pond to seep out bottom is a wasteful use of water when alternatives exist that prevent such loss and still accomplish the intended purpose.

**B-5.6934**  
**B-5.6979** Applicant did not prove that quantity of water proposed to be used for fish and wildlife is minimum amount necessary for proposed beneficial use.

**L-1.940** Rescinding a policy does not replace the burden an applicant has to show the proposed use is a beneficial use of water and the amount requested is justified.

**M-5.110** **Final order:** The record does not show that inspection of means of diversion, construction, and operation by licensed engineer is necessary to show criteria are satisfied.

**T-5.800** Diversion limited to certain months; pond must be lined to prevent seepage; and excess water must be diverted back to source.

**Final order:** Record does not show that continuous flow monitoring by applicant will help satisfy a criteria for issuance of a permit. Monitoring upstream of objectors will not tell applicant what objectors' needs are.

Consolidated with hearing *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583100* by Benjamin L. & Laura M. Weidling.

Appealed to District Court.

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<b>Final Order Date:</b>	12/24/2002	<b>Applicant:</b>	Eberhart, Lois E.
<b>Action:</b>	Denied		
<b>Case/Application #:</b>	11533100	<b>Regional Office:</b>	Billings
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	06/27/2001	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	10/21/2002	<b>OA Examiner:</b>	none
<b>Oral Argument Date:</b>	none	<b>Use:</b>	lawn and garden

U-14.1259.00      Applicant did not provide any analysis comparing water physically available with the legal demand. The lack of this analysis does not allow a conclusion that water is legally available in spite of the fact water was historically used as requested prior to July 1, 1973. (No claim filed.)

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<b>Final Order Date:</b>	10/09/2002	<b>Applicant:</b>	Wilkins, Dave and Howard
<b>Action:</b>	Granted With Conditions		
<b>Case/Application #:</b>	76LJ-11406600	<b>Regional Office:</b>	Kalispell
<b>Application Type:</b>	Permit		
<b>Application Date:</b>	12/15/2000	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	08/13/2002	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	power generation

T-5.800      Minimum flow instream below point of diversion; return water diverted to stream at specified point; specific construction measures required to dissipate energy of falling water to prevent channel bed erosion by water re-entry; measuring device and reporting of flow and volume required.  
Minimum flow condition not usually placed on permits; however, pursuant to MEPA, measures mutually developed at the request of project sponsor may be incorporated into a permit.

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<b>Final Order Date:</b>	[Pending FO]	<b>Applicant:</b>	Pribyl, James & Marjorie
<b>Action:</b>	Permit Modified		
<b>Case/Application #:</b>	41QJ 30006070 41QJ 30006071	<b>Regional Office:</b>	Lewistown
<b>Application Type:</b>	Stock water Permit		
<b>Application Date:</b>	4/28/03	<b>Examiner:</b>	Brasen
<b>Hearing Date:</b>	7/28/04	<b>OA Examiner:</b>	Mary Vandebosch
<b>Oral Argument Date:</b>	02/11/05	<b>Use:</b>	Stock water

B-21.78      In a stock water permit hearing complainant has the burden of proof, and has the initial burden of production to produce evidence to persuade the Hearing Examiner that they have been adversely affected. However, once complainant has presented evidence they have been adversely affected by permittee's exercise of their reservoir permits, permittee has the burden of producing evidence that there is no adverse effect, **or** the effect is one under which complainant can reasonably exercise its senior existing appropriations so that there is no adverse effect, **or** permittee must offer modifications to the Permits which will prevent adverse effects to Complainant's existing water rights.

A-4.93  
A-4.9383

To claim adverse effect at times water does not flow on the surface to complainant, evidence must be presented that shows the water which goes underground upstream of the complainant actually ends up in complainant's reservoir.

A-16.7521

The Department has jurisdiction under Mont. Code Ann. § 85-2-306(3) to automatically issue a provisional permit after construction of an impoundment for stock water use upon receipt of a correct and complete application for a stock water provisional permit. The Department (Regional Office) determined the Permittee's application to be correct and complete and subsequently issued Water Use Permits. Because of the discussion at hearing regarding correct and complete applications I have reviewed the application regarding correct and complete, and agree with the Regional Office's determination.

S-21.660

The Hearing Examiner ruled that submittal of the Applications after sixty days is not cause for revocation. Contested case hearings held on completed stock water permits are conducted to determine if the rights of other appropriators have been or will be adversely affected by the impoundment. Mont. Code Ann. § 85-2-306(3). This section does not include a penalty for submittal outside the sixty-day period following completion. No law allows the Department to revoke a permit on the basis that the permit (and water) use may have been illegal because the application was not received within sixty days of completion of the reservoir.

[OA Held 2/11/05]

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<b>Final Order Date:</b>	01/10/05	<b>Applicant:</b>	<b>J. Harry Taylor II and Jacqueline R. Taylor</b>
<b>Action:</b>	Denied		
<b>Case/Application #:</b>	40M-30005660	<b>Regional Office:</b>	Glasgow
<b>Application Type:</b>	Change		
<b>Application Date:</b>	03/25/2003	<b>Examiner:</b>	Vandenbosch
<b>Hearing Date:</b>	09/08/2004	<b>OA Examiner:</b>	N/A
<b>Oral Argument Date:</b>	N/A	<b>Use:</b>	Irrigation

B 21.780  
A-4.930

The applicant for a change of appropriation right has the burden as to the nonexistence of adverse effect. (Final Order (FO))  
Applicant did not make a prima facie case that the use of existing water rights would not be adversely affected. (Proposal for Decision (PFD))

A-4.9348.48

The burden of proof is on the applicant to prove that the criteria in 85-2-402 have been met, regardless of whether or not there are objections to the application. The Department must determine whether or not the Applicant has proven that the proposed change will not adversely affect the use of all existing water rights of other persons, not just the water rights that belong to irrigators or to persons who participate in the hearing.(FO)

Applicant did not show that the consumptive use of water would not increase under the proposed change. (PFD)

Consumptive use after a change may not exceed historic consumptive use. (FO)

A-4.9348.20  
A-4.9379

The Applicant did not prove that moving the point of diversion would not adversely affect the use of other water rights.(FO)

A change may not be authorized where decreases in the amount of return flow cause adverse effect to existing appropriators downstream of where the return flow historically entered the stream. (FO)

**B-21.78**

Volume of water proposed to be diverted is greater than the reasonable amount necessary to accomplish the proposed use without waste. Took official notice of tables derived from Natural Resources Conservation Service *Irrigation Guide for Montana*. Criterion will be satisfied if subject to a condition.(PFD)

**T-5.800**

Department may approve a change subject to a condition that it considers necessary to satisfy the criteria.(PFD)

The following constitutes indexing of  
Proposals for Decisions which have not yet  
been issued a Final Order. These will be  
added to the index when the Final Order is  
issued, or when the quarterly update is  
printed.

<b>Final Order Date:</b>		<b>Applicant:</b>	Pope
<b>Case #/Type:</b>	G15152-s76L (C)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	10/05/84	<b>Examiner:</b>	Scott
<b>Hearing Date:</b>		<b>Use:</b>	Irrigation

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<b>Final Order Date:</b>		<b>Applicant:</b>	Rasmussen
<b>Case #/Type:</b>	63023-s76L (P)	<b>Regional Office:</b>	Kalispell
<b>Application Date:</b>	06/16/86	<b>Examiner:</b>	Elting
<b>Hearing Date:</b>	02/28/89	<b>Use:</b>	Domestic